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REDACTED—FOR PUBLIC INSPECTION

June 21, 2004

RECEIVED

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-A325
445 12th Street, S.W.
Washington, DC 20554

Re: *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*

Dear Ms. Dortch:

Enclosed with this cover letter for filing today are an original and four copies of the Petition (redacted) of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c). Portions of the Petition contain confidential (redacted) information. In addition, enclosed are an original and four copies of two exhibits to the Petition that contain confidential (redacted) information: the Affidavit of David L. Teitzel (Exhibit A) and the Affidavit of John Haring, Jeffrey H. Rohlfs and Harry M. Shooshan II (Exhibit B). The non-redacted, confidential versions of the Petition and Affidavits are being filed today under separate cover.

Each page of the confidential versions of the Petition and Affidavits are marked "***NON-REDACTED—NOT AVAILABLE FOR PUBLIC INSPECTION***", since it was not feasible for the confidential information to be physically separated from the Petition or Affidavits (*see* Section 0.459(a) of the Commission's rules, 47 C.F.R. § 0.459(a)). Each page of the non-confidential versions of the Petition and Affidavits are marked "***REDACTED–FOR PUBLIC INSPECTION***". Except for the excised confidential portions of the Petition and Affidavits, the filings are the same. In the redacted versions of the Petition and Affidavits, where confidential information has been removed, the relevant portions of the text are either blacked out or marked "**Data Redacted**".

Notwithstanding the confidential nature of certain information contained in the Petition and Affidavits, Qwest wishes to assist the Commission by enabling interested parties to have proper access to the non-redacted information. Therefore, Qwest also encloses with this letter an original and four copies of a Request for Confidential Treatment, which provides the legal justification as to the claim of confidentiality, along with a proposed protective order. If this

Request is approved by the Commission, it would provide parties with the means to review, pursuant to the requirements of the adopted protective order, the confidential and competitively sensitive information being filed today.

A fifth copy of the Petition and Request for Confidential Treatment are being provided, for which acknowledgment is requested. Please date-stamp the copies and return them to the courier. If you have any questions regarding this submission, please contact the undersigned at the contact information reflected in the letterhead. Thank you for your assistance with this matter.

Sincerely,

Michael B. Adams, Jr.

Enclosures

REDACTED–FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)
	)
Petition of Qwest Corporation for Forbearance	)
Pursuant to 47 U.S.C. § 160(c) in the	)
Omaha Metropolitan Statistical Area	)

PETITION OF QWEST CORPORATION FOR FORBEARANCE PURSUANT TO 47 U.S.C. § 160(c)

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QWEST CORPORATION

June 21, 2004

TABLE OF CONTENTS

SUMMARY

In the preamble to the Telecommunications Act of 1996, Congress set forth its purposes:

> AN ACT To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.[1]

In other words, Congress passed the act to promote improved, innovative, and cheaper telecommunications services. Congress listed two coequal methods of promoting those ends – competition and deregulation. During the eight years since the 1996 Act was passed, the Commission has spent a considerable amount of effort effectuating the first of those two methods, competition, and has focused less on the second method, deregulation. Only when both competition and deregulation are implemented will the purposes of the 1996 Act be achieved.

Congress gave the Commission a powerful tool to effectuate deregulation – Section 10, which gives the Commission extraordinary power to forbear from its own regulations and even other sections of the 1996 Act.[2] When it granted these powers to the Commission, Congress demonstrated that it was quite serious about deregulation. Congress also indicated that it intended that the forbearance authority be used – the language of the section is proscriptive, stating that "the Commission *shall* forbear."[3]

The focus on competition has borne fruit, and Congress's vision of a competitive marketplace has been achieved – perhaps most completely in the Omaha MSA. In Omaha, an ILEC provider, Qwest, has less than [redacted] of the local access lines. When wireless providers are included in the analysis, Qwest's share of the market is even lower. The competition in the

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1 *See* the preamble to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

2 47 U.S.C. § 160.

Omaha MSA is mature and does not rely on resale of Qwest services or unbundled access to its network elements. The competitors in Omaha primarily use their network and facilities to provide their telecommunications services.

Now that competition has fully developed in the Omaha MSA, there can be no remaining reason to delay implementation of the deregulatory purposes of the 1996 Act in that area. In this petition, Qwest asks the Commission to recognize that the telecommunications landscape has been transformed in the Omaha MSA by using the powerful deregulatory tool given to it by Congress – the forbearance power of Section 10. In this petition, Qwest demonstrates that by forbearing from the requirements of Section 251(c), certain requirements of Section 271 and dominant-provider regulations, the Commission will be promoting the goals of the 1996 Act – innovative, improved and cheaper telecommunications services. Qwest demonstrates that those regulations are no longer necessary to protect consumers or competition, and that forbearing from them will eliminate cost-distorting and investment-discouraging unequal regulations.

With the elimination of these unequal regulations, competitors can begin to compete on the basis of which carrier can provide the best, most innovative services at the lowest prices. Investment will flow to the competitors that can most efficiently provide innovative services, and investment will no longer be discouraged by restrictions imposed upon only some competitors. Competition will continue unabated, and deregulation will encourage investment in, and development of, new, innovative services at low prices, thus finally achieving Congress's goals in passing the 1996 Act.

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[3] 47 U.S.C. § 160(a)(emphasis added).

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PETITION OF QWEST CORPORATION FOR
FORBEARANCE PURSUANT TO 47 U.S.C. § 160(c)

Qwest Corporation ("Qwest"), through counsel and pursuant to Section 10 of the Telecommunications Act of 1996,[4] hereby petitions the Federal Communications Commission ("Commission") to forbear from applying the requirements of Section 251(c) and of Section 271(c)(2)(B)(i-vi) and (xiv) of the 1996 Act to Qwest's provision of telecommunications services in the Omaha, Nebraska Metropolitan Statistical Area ("MSA") based on the reality of its non-dominant status in the Omaha MSA. For the same reasons, Qwest asks that the Commission further forbear from regulating Qwest as a dominant carrier and as the incumbent local exchange carrier ("ILEC") in the Omaha MSA.

I. INTRODUCTION

The Commission has recognized that it must continually adjust its regulations to reflect market conditions, particularly when competitive conditions change and the rationales that used to underlay the Commission's regulations no longer serve the public interest.[5] The Commission

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[4] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act") and 47 U.S.C. § 160.

[5] *See, e.g.*, In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as

performs such a general analysis of the fit between its regulations and the changing telecommunications market every two years under its *Biennial Review Process*.[6] The Commission has also changed the specific regulatory treatment of individual carriers, such as reclassifying AT&T Corp. as a nondominant carrier.[7] On a third track, the Commission may similarly grant forbearance to carriers from specific regulations under Section 10 of the Communications Act of 1934, as amended ("Communications Act").[8]

Section 10(a) specifies that the Commission may forbear from applying any regulation or provision of the Communications Act if it determines that: (1) enforcement of that regulation or statutory provision is not necessary to ensure that rates and practices are just, reasonable, and not unreasonably discriminatory; (2) their enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.[9] In making the public interest determination, Section 10(b) requires that the Commission shall consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition.[10] Lastly, Section 10(d) provides that in the specific case of Sections 251(c) or Section 271 of the 1996 Act, the Commission may not forbear from their requirements until the

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amended; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment And Enhanced Services Unbundling Rules In the Interexchange, Exchange Access and Local Exchange Markets, *Report and Order*, 16 FCC Rcd 7418 (2001) (eliminating as outdated prohibitions against bundling of telecommunications services and customer premises equipment at discounted prices).

6 *See* 47 U.S.C. § 161(a).

7 *See, e.g.*, In the Matter of Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, *Order*, 11 FCC Rcd 3271 (1995) ("*AT&T Reclassification Order*").

8 *See* 47 U.S.C. § 160(a).

9 47 U.S.C. § 160(a)(1)-(3).

10 *See* 47 U.S.C. § 160(b).

Commission has determined that those requirements have been fully implemented.[11]

In this petition, Qwest is seeking forbearance from a group of specific regulatory obligations under Section 251(c) and Section 271, as well as from dominant carrier regulation and from regulation as an ILEC in the Omaha MSA. Qwest is requesting these regulatory changes because it is no longer the dominant carrier in the Omaha MSA due to intense competition both from facilities-based wireline carriers and from intermodal competitors such as cable television ("CATV") providers and commercial mobile radio service ("CMRS") providers, which are using their separate networks and technologies to compete directly with Qwest's services. The manner in which Qwest is regulated no longer matches the reality of the marketplace, and Qwest's asymmetric regulatory burden must be altered if Qwest is going to compete effectively with other companies and bring the full benefit of a competitive market to consumers in the Omaha MSA.

The rapid growth of Qwest's competitors demonstrates that the Omaha MSA has no legal or economic barriers to entry, as well as the fact that Qwest does not enjoy an advantage in terms of its costs, structure, size and resources in these markets. In addition to the fact that there are multiple true facility-based providers of telecommunications services in the Omaha MSA who are not relying on Qwest's Section 251(c) offerings, the fierceness of the competition in the Omaha MSA telecommunications market is further illustrated by market statistics. Over the last several years, Qwest has lost a significant number of the residential and business customers to which it provides local exchange services to competitive local exchange carriers ("CLEC"), CATV and CMRS competitors. As a result of these losses, Qwest currently serves less than [redacted]

[11] *See* 47 U.S.C. § 160(d).

of the residential and business lines in the Omaha MSA.[12]

Based on these changed facts and circumstances, Qwest's petition satisfies each of the statutory criteria for forbearance in Section 10(a). Due to the competitiveness of the Omaha MSA telecommunications market, regulating Qwest under the specific provisions of Section 251(c) and Section 271 identified in this petition is no longer necessary to ensure that rates and practices in the Omaha MSA are just, reasonable, and not unreasonably discriminatory. Similarly, it is also no longer necessary to regulate Qwest as an ILEC or to maintain dominant carrier regulation over Qwest's telecommunications services in the Omaha MSA. Qwest has no more market power then any other provider in the Omaha MSA and since Qwest no longer has neither the power to control prices nor the ability to act in a discriminatory manner in the Omaha MSA, it is no longer necessary to regulate Qwest intensively in order to protect consumers. It has also become clear that continuing to subject Qwest's services to asymmetric regulation deprives customers of the benefits of true competition by imposing unnecessary regulatory costs on Qwest, and hampers Qwest's ability to quickly and effectively respond to competitive initiatives. Moreover, because the Commission has previously determined that Qwest has fully implemented the requirements of Section 251(c) and Section 271 in the State of Nebraska, there is no question that the Commission has the authority to grant Qwest forbearance from certain of its requirements under Section 10(d).[13]

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[12] *See* Exhibit A, Affidavit of David L. Teitzel at 7 ("Teitzel Affidavit").

[13] *See* In the Matter of Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming, *Memorandum Opinion and Order*, 17 FCC Rcd 26303 (2002) ("*Qwest Section 271 Order*").

II. QWEST IS NO LONGER DOMINANT IN THE OMAHA MSA TELECOMMUNICATIONS MARKET

In determining whether a carrier remains dominant in a relevant product and geographic market, the Commission has traditionally evaluated whether the carrier has market power, as determined according to antitrust principles.[14] The Commission has relied on several factors as part of this analysis, including: (i) market participants; (ii) the demand elasticity of customers; (iii) the supply elasticity of the market; (iv) the carrier's costs, structure, size and resources; and (v) market share. An examination of each of these factors clearly demonstrates that due to the aggressive growth of facilities-based CLECs and facilities-based intermodal competitors, Qwest is no longer the dominant carrier in the Omaha MSA telecommunications market, and that Qwest no longer enjoys market power in the Omaha MSA.

A. The Relevant Product and Geographic Markets

The first step in analyzing these changes in Qwest's market power is to determine the relevant product and geographic markets.[15] This approach allows for assessment of the market power of a particular carrier based on unique market situations by recognizing, for example, that "carriers may target particular types of customers, provide specialized services, or control independent facilities in specific geographic areas."[16] In this petition, Qwest has carefully limited the scope of relief to product and geographic markets which are clearly competitive.

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[14] *See* In the Matter of Comsat Corporation; Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier, *Order and Notice of Proposed Rulemaking*, 13 FCC Rcd 14083, 14118-19 ¶ 67 (1998) ("*Comsat Reclassification Order*").

[15] *AT&T Reclassification Order*, 11 FCC Rcd at 3285 ¶ 19.

[16] *Comsat Reclassification Order*, 13 FCC Rcd at 14099-100 ¶ 27.

1. The Relevant Product Market

A relevant product market is a service or group of services for which there are no close demand substitutes.[17] In turn, the task of defining a relevant product market involves identifying and aggregating consumers with similar demand patterns.[18]

In accordance with the Commission's analytical framework, the relevant product market for which Qwest is seeking forbearance is the market for services provided under Section 251(c) and selected services under Section 271 provided within the boundaries of the Omaha MSA due to the mass market residential services and business services, local exchange and exchange access services offered by full facility-based CATV providers (as CLECs) and CMRS providers.[19]

2. The Relevant Geographic Market

As the Commission has explained in past proceedings, a relevant geographic market is defined by demand, and "aggregates into one market those consumers with similar choices regarding a particular good or service in the same geographical area."[20]

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[17] *See id.* at 14098-99 ¶ 25 citing the *LEC Classification Order*, 12 FCC Rcd 15756, 15782 ¶ 41, 15787-88 ¶ 54 (1997).

[18] *See* Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations, *Memorandum Opinion and Order*, 15 FCC Rcd 14032, 14088-89 ¶ 102 (2000).

[19] Including CMRS providers in this product market is consistent with the Commission's recognition that the product market for local exchange and exchange access services includes both wireline and wireless providers. *See, e.g.,* Application of 360° Communications Company, Transferor, and AllTel Corporation, Transferee, For Consent to Transfer Control of 360° Communications Company and Its Affiliates, *Memorandum Opinion and Order*, 14 FCC Rcd 2005, 2011-12 ¶ 14 (1998).

[20] *Comsat Reclassification Order*, 13 FCC Rcd at 14099-100 ¶ 27; *see also* In the Applications of NYNEX Corporation and Bell Atlantic Corporation For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, *Memorandum Opinion and Order*, 12 FCC Rcd 19985, 20016-17 ¶ 54 (1997) (defining relevant geographic area as "an area in which all

Qwest is seeking forbearance from Section 251(c) and Section 271 regulation, as well as from dominant carrier regulation of telecommunications services provided within the Omaha MSA geographic market. The Omaha MSA encompasses approximately 2,000 square miles and is made up of five counties, including Douglas, Sarpy, Washington and Cass counties in the State of Nebraska, as well as Pottawattamie County in the State of Iowa. As of the 2000 United States Census, the Omaha MSA has a population of 629,294 residents and contains 241,721 households.

While Qwest faces competition in local exchanges throughout the State of Nebraska, in Omaha, there is an unusually large and identifiable class of facilities-based competitors, *i.e.*, carriers that provide service using their own facilities and not unbundled elements purchased from an ILEC. Because the competitive characteristics of the Omaha MSA are readily identifiable and are not necessarily similar to the competitive characteristics of other areas in the state, Qwest is asking for forbearance in the Omaha MSA only.[21]

B. Qwest is No Longer a Dominant Carrier in the Omaha MSA Telecommunications Market

In forbearance proceedings, the questions of whether a carrier still enjoys market power and whether it remains dominant in the relevant product and geographic market are determined

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customers in that area will likely face the same competitive alternatives" for a relevant service) ("*Bell Atlantic/NYNEX Order*").

[21] This petition should not in any way be construed to imply that MSAs are the only proper geographical areas for consideration in petitions for forbearance or non-dominance. Depending on the particular factual circumstances, future forbearance and non-dominance petitions could be brought based upon the competitive characteristics of smaller areas, entire states, or multi-state regions. In addition, this petition should not be in any way construed to imply that MSAs are or are not the proper geographical scope for unbundling analyses, such as the necessary and impair analysis.

according to antitrust principles.[22] As discussed above, the Commission has relied on several factors as part of this analysis, including: (i) market participants; (ii) the demand elasticity of customers; (iii) the supply elasticity of the market; (iv) the carrier's costs, structure, size and resources; and (v) market share. An examination of each of these factors demonstrates that Qwest is clearly not dominant in the Omaha MSA telecommunications market, and cannot exercise market power.

1. The Omaha MSA Telecommunications Market is Extremely Competitive

The Omaha MSA telecommunications market is extremely competitive. Qwest competes against facilities-based wireline competitors, and also faces intense intermodal competition from CATV-based CLECs and CMRS providers. All of these competitors are firmly established in the Omaha MSA geographic market, and they enjoy substantial customer bases and brand recognition. Although Qwest believes that forbearance can be justified based upon the Omaha MSA level of wireline competition alone, each of these factors shows that the Commission can and should also consider competition from CMRS providers as well, since their services have become directly competitive with Qwest's local exchange service offerings.

As demonstrated in the Teitzel Affidavit, the CLECs are rapidly increasing their market share in the Omaha MSA. Of these CLECs, Qwest's most significant local exchange competitor is Cox Communications, which now offers CATV-based telephony service throughout all of Qwest's service territory in the Omaha MSA using its own coaxial fiber network.[23] Qwest's

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[22] *See Comsat Reclassification Order*, 13 FCC Rcd at 14118-19 ¶ 67.

[23] *See* Exhibit A, Teitzel Affidavit at Attachment 2. Cox has stated that as of April 30, 2002, its Omaha CATV system was comprised of 295,863 serviceable homes, 360,000 total residential "revenue generating units" – a term used by Cox to describe households that are potential or current Cox customers within the defined market – as well as 7,587 commercial customers. At that time two years ago, Cox estimated its residential telephony market share to be

CLEC competitors also include McLeod and AllTel, which are also facilities-based CLECs that serve the Omaha MSA using their own networks, and which have overbuilt Qwest's legacy facilities.[24]

In addition to wireline-based CLECs, Qwest also faces additional intermodal competition, principally from CMRS providers but also from companies that provide VoIP services over broadband facilities, such as CATV coaxial networks.[25] It is both appropriate and necessary to consider these additional intermodal competitors when analyzing the competitiveness of the Omaha MSA telecommunications market since the lines between these service providers are blurring and because these providers are directly competing for Qwest's customers. Clearly, end users are increasingly viewing their wireless options as more than sufficient to meet their telecommunications needs. As the Nebraska Public Service Commission ("Nebraska PSC") recently noted in its annual report on the state's telecommunications market, wireline and wireless services are increasingly in direct competition with each other for the same consumers. Specifically:

> Wireless carriers continue to command a greater share of the consumer market in telecommunication. In the four years since wireless carriers reached one-third of the total access lines in Nebraska, the gap between wireless and wireline users continues to shrink. This year, wireless access lines total 774,185, a growth of seven percent over the end of 2002. Correspondingly, wireline usage has shrunk to 1,112,182 lines, a drop of 31,929, nearly four times the reduction from the previous fiscal year.[26]

26.5 percent of the Omaha market. More recently, Cox reported that residential telephony penetration was approaching 50 pecent of its basic cable customer base in Omaha. *See* Exhibit A, Teitzel Affidavit at 11.

[24] *Id.* at 18, 21.

[25] *Id.* at 26.

[26] *See* Nebraska Public Service Commission, *Annual Report to the Legislature on the Status of the Nebraska Telecommunications Industry* (Sept. 30, 2003).

Wireless subscribership well exceeds traditional ILEC lines in service in the State of Nebraska. According to the Commission's Local Competition Report, there were 900,744 wireless subscribers in Nebraska, compared to 775,829 ILEC access lines in service.[27] What is more, wireless service options are available from at least one CMRS provider in every Qwest wire center in the Omaha MSA. The CMRS providers serving the Omaha MSA include Verizon, Sprint, AllTel, Cricket, Nextel, U.S. Cellular and MCI.[28]

There are other clear indicia that wireless services are directly competing with wireline services – such as the CTIA's recent data showing that wireless minutes of use grew over 1600 percent between 1995 and 2002,[29] at the same time that wireline long distance usage has fallen from an average of 143 minutes per month in 1995 to just 90 minutes in 2002.[30] According to other estimates, wireless has now displaced about 30 percent of total wireline minutes.[31] These facts and figures demonstrate the ability and willingness of customers to substitute among technologies and this nationwide pattern is repeated in the Omaha MSA. Wireless number portability will increase the proportion of wireless subscribers willing to substitute wireless for wireline service.

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27 *See Local Telephone Competition: Status as of June 30, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau, December 2003, at Table 13 and Table 6, respectively.

28 *See* Exhibit A, Teitzel Affidavit at 28.

29 *See* CTIA State of the Wireless Union Presentation (available at http://www.ctia.org/conventions_events/ctia_events/index.cfm/AID/10085).

30 *See Trends in Telephone Service*, Wireline Competition Bureau, May 2004 at Table 14.2.

31 *See* In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Eighth Report*, 18 FCC Rcd 14783, 14832 ¶ 102 (2003), *citing* Cannon Carr and Gregor Dannacher, *Can Wireline Cannibalization Save Wireless ARPU in 2003*, CIBC World Markets, Dec. 11, 2002, at 8.

As discussed in the Teitzel Affidavit, research that was released by Advantis in January of 2004 showed that, absent wireless number portability, 6.4 percent of respondents report a willingness to "cut the cord." With number portability, the percentage willing to "cut the cord" increases to 11.5 percent.[32] This data corresponds with statements by Cricket that 37 percent of its customers had discontinued their landline service and have begun relying solely on wireless services.[33] Cricket's survey is borne out by a recent survey that Qwest performed of wireless users in adjacent states, which demonstrated the following:

- Approximately 25 percent of the personal and business wireless phone users in Iowa reported not having a traditional landline phone in their home or in their place of business;
- If wireless service did not exist, 70 percent of the personal wireless phone users and 45 percent of the business users indicated that they would install traditional landline service;
- In the absence of wireless services in Iowa, at least 75 percent of the personal wireless calls and 60 percent of the business calls would have been made on traditional landline telephones;
- In Utah, approximately 27 percent of the wireless phone users are substituting wireless service for home residential service;
- Twelve percent of these Utah wireless customers had previously had wireline telecommunications service, but had discontinued it;
- An additional 9 percent had never subscribed to wireline service, but say that they would do so if wireless services were not available; and
- 5.5 percent of the surveyed wireless customers in Utah stated that they had terminated service on a second home line "exclusively" because of the ability to substitute wireless service for the second line.

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[32] *See* Exhibit A, Teitzel Affidavit at 24.

[33] *See* http://www.leapwireless.com/dindex.html.

As shown in the economic analysis performed by Strategic Policy Research, which is attached as Exhibit B to this petition, the presence of intermodal competition from CMRS providers plays a significant role in reducing any market power and precluding market "dominance" by any single carrier in related market sectors.[34] As their analysis states, "regardless of whether one regards wireless service as a sufficiently close substitute for wireline service to constitute the *same* economic good (*i.e.*, trading in the *same* market), the existence of good wireless service lowers the elasticity of demand for wireline service and, consequently, the scope for any exercise of market power."[35] As a result, even if the Omaha MSA's telecommunications market is construed narrowly, and CMRS services are "excluded," they still have an effect on demand elasticity that must be factored.[36]

In addition to the increasing number of consumers that are substituting their wireline services for CMRS services, VoIP is also becoming a competitive factor in the Omaha MSA and promises to further erode the wireline market. Currently, at least seven VoIP providers – including AT&T, 5 Star Telecom, Packet 8, VoicePulse, BroadVoice and Zipglobal – are providing telephony services in the Omaha MSA. These services can be accessed by any customer that has a broadband internet connection.[37] Since the vast majority of Qwest customers in the Omaha MSA have access to a broadband internet connection via cable modem from Cox or via DSL, VoIP is readily available to customers throughout its geographic area.[38]

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[34] *See* Exhibit B, Strategic Policy Research Study at 5-6 [internal citation omitted].

[35] *Id.*

[36] *Id.*

[37] *See* Exhibit A, Teitzel Affidavit, Attachment 2.

[38] *See id.* at 11. Cox reported 295,863 serviceable homes in its Omaha MSA cable system as of April 30, 2002, and that their residential telephony penetration of its basic customer base

2. Qwest is No Longer the Sole Facilities-Based LEC in the Omaha MSA

Due to overbuilding by competitors, Qwest is no longer the sole facilities-based LEC in the Omaha MSA telecommunications market. As discussed above, Cox Communications now offers CATV-based telephony service throughout virtually all of Qwest's service territory in the Omaha MSA using its own coaxial fiber network.[39] CLEC competitors also include McLeod and AllTel, which are facilities-based CLECs and which serve the Omaha MSA using their own networks.[40]

As the Teitzel Affidavit also makes clear, the CLECs serving the Omaha MSA have been shifting away from using resale, and are increasingly providing local exchange service using their own facilities.[41] As part of this shift, the CLECs now serving the Omaha MSA have deployed voice switches with capacity to serve a significantly greater number of end-user lines than they are currently serving. The Local Exchange Routing Guide ("LERG") shows that there is now at least one DMS 500 switch, one DMS 100/200 switch and one 5ESS switch deployed to serve the Omaha MSA.[42] The three switches can alone accommodate approximately 400,000 end-user

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was "approaching 50%" at that time. On this basis, it can be estimated that Cox is now providing telephone service to approximately 148,000 households in the Omaha MSA, and each of these households has direct access to Cox broadband internet service. In contrast, Qwest's DSL subscriber base in the Omaha area was approximately [redacted] in May 2004. Clearly, a disproportionate number of customers in the Omaha MSA interested in utilizing VoIP for their telephony needs may do so via Cox broadband connections.

39 *See* Exhibit A, Teitzel Affidavit at Attachment C (Cox service area map).

40 *Id.* at 3-6.

41 *Id.* at 1-2 and 3-7.

42 *Id.* at 9.

lines.[43] Other CLECs have deployed switches to serve the Omaha MSA as well, but the switch types are not specified in the LERG.

As stated in the Teitzel Affidavit, at least seven wireless carriers offer service in Qwest's Nebraska service territory, including the Omaha MSA, and provide voice services that can be used as a substitute for Qwest wireline services.[44] In fact, one of these carriers, Cricket, actively markets its flat-rated wireless service as a complete substitute for traditional wireline service and urges its potential customers to "cut the cord." With the advent of number portability for wireless, customers of traditional landline service are now able to retain their preexisting telephone numbers when they elect to use wireless service as the primary telephone service. It is now more convenient than ever for existing Qwest landline customers to migrate to the separate networks of the various wireless carriers serving the Omaha MSA.

It should also be noted that like Cox and AllTel, the CMRS providers that compete with Qwest in the Omaha MSA use switches and networks that are entirely separate from Qwest's network, yet which overlay Qwest's service territory.

As a result, it is clear that Qwest is no longer the exclusive source of switching and local loop facilities in the Omaha MSA, and that Qwest faces intense competition from established

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[43] *Id.* As the Teitzel Affidavit explains, the LERG shows a total of eight CLECs with prefixes assigned to switches serving rate centers in the Omaha MSA. In several instances, the reporting CLEC declined to specify the type of switch used, and notes simply a switch type of "digital switching system." However, the LERG shows that one DMS 500, one DMS 100/200 and one 5ESS switch are located in Omaha to serve this market. A DMS 500 switch and DMS 100/200 switch can each serve a maximum of 100,000 access lines, while a 5ESS switch can serve 200,000 access lines. In other words, these three Omaha CLEC switches alone can accommodate approximately 400,000 end-user lines, which is nearly double the number of facilities-based CLEC lines that are currently in service in the Omaha MSA.

[44] *See* Exhibit A at 23. The Teitzel Affidavit notes that a wide range of CMRS providers serve the Omaha MSA, including Verizon, Sprint, AllTel, Nextel, U.S. Cellular and MCI. *Id.*

facilities-based providers in the provisioning of local exchange services in the Omaha MSA.

3. There is Elastic Demand for Residential and Business Telecommunications Services in the Omaha MSA

"Demand elasticity" refers to the willingness and ability of a carrier's customers to switch to a competitive provider, or to otherwise change the amount of services they purchase from the carrier in response to a change in the price of the service. High demand elasticity indicates that customers are willing and able to switch to another service provider in order to obtain price reductions or desired features. It also indicates that the particular service market is subject to competition.[45]

As shown in the economic analysis performed by Strategic Policy Research (Exhibit B), there is a high degree of demand elasticity for telecommunications services in the Omaha MSA, particularly when intermodal competition is factored directly.[46] As it notes:

> In the Omaha market, the service demand elasticities perceived by Qwest are quite *high – i.e.,* demand is very *elastic*, indeed. Consider that with several firms offering virtually indistinguishable service offerings to Qwest's telecommunications offerings at comparable, competitive prices, any attempt by Qwest to raise the prices of its offerings would prompt wholesale substitution of its competitor's offerings by consumers.[47]

The Strategic Policy Research analysis further states that the fact that the demand for Qwest's services has declined by more than [redacted] within three years in response to "*far less* than an effective halving of prices" shows the high demand elasticity for Qwest's services among customers.[48] The study concludes that such demand elasticity precludes any opportunities for a

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45 *See Comsat Reclassification Order*, 13 FCC Rcd at 14120 ¶ 71.

46 *See* Exhibit B at 6-7 and 11-14.

47 *Id.* at 15 (emphasis in original).

48 *Id.* (emphasis in original).

profitable restriction of output, due to the availability of alternative service providers to consumers.[49]

4. There is an Elastic Supply of Local Exchange Services in the Omaha MSA

"Supply elasticity" refers to the ability of suppliers in a given market to increase the quantity of services supplied in response to an increase in price. There are two factors that determine supply elasticities in the market. The first is the supply capacity of existing competitors, because supply elasticities tend to be high if existing competitors have or can easily acquire additional capacity in a relatively short time period.[50] The second factor is the existence of low barriers to entry, because supply elasticities tend to be high if new suppliers can enter the market relatively easily and add to existing capacity.

As shown in the economic analysis performed by Strategic Policy Research, there is a highly elastic supply of both local exchange services and facilities in the Omaha MSA. Citing the data contained in the Teitzel Affidavit, the study concludes that:

> This data indicates that there is ample "excess" switching capacity *currently deployed*, and that competitors are well-positioned to expand the number of access lines they serve. [citation omitted] These data are completely inconsistent with "weak" competitors incapable of inflicting significant competitive losses on Qwest. To the contrary, competitors are in a position to take virtually *the whole market* (more than [redacted] of which they have already taken) . . .[51]

Similarly, the impressive growth of Qwest's competitors' market share in the Omaha MSA market for local exchange services demonstrates that the cost of entry is not prohibitive.[52]

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49 *Id.* at 15-16.

50 *See Comsat Reclassification Order*, 13 FCC Rcd at 14123-24 ¶ 78.

51 Exhibit B, Strategic Policy Research Study at 14.

52 *See, e.g., id.* at 8-10 and 13-14.

Lastly, there are no legal barriers to entry in the Omaha MSA.[53] Competitive providers have other market entry options in those areas where they choose not to deploy facilities. With the adoption of the 1996 Act, Congress implemented a comprehensive system of market-opening provisions that benefit both facilities-based carriers and pure resellers. This flexibility allows competitive providers to increase their market presence through resale beyond the reach of their existing networks. It also allows them to increase their market share more quickly than would be possible solely through expansion of their own networks. On this basis, the Strategic Policy Research study concludes that there are "no legal barriers preventing expansion of output by competitors" in the Omaha MSA.[54]

5. Qwest's Costs, Structure, Size and Resources No Longer Give it an Advantage Over Competitors

In the *AT&T Reclassification Order*, the Commission addressed the question of whether AT&T's size relative to other carriers might give it a significant advantage in terms of scale economies and access to capital.[55] Qwest does not currently enjoy any such advantage in the Omaha MSA market for local exchange services. While the Commission considered the fact that AT&T faced at least two "full-fledged facilities-based competitors" in the long distance market,[56] Qwest faces established facilities-based competitors, including cable providers, CDMA providers and competitors using IP-based technology, in the Omaha MSA that increasingly compete for

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53 *Compare Comsat Reclassification Order*, 13 FCC Rcd at 14125 ¶ 82.

54 *See* Exhibit B, Strategic Policy Research Study at 8.

55 *AT&T Reclassification Order*, 11 FCC Rcd at 3309 ¶ 73. The Commission recently held that Comsat does not have market power, notwithstanding its finding that Comsat has competitive advantages in size and access to resources. *Comsat Reclassification Order*, 13 FCC Rcd at 14131-32 ¶ 93.

56 *AT&T Reclassification Order*, 11 FCC Rcd at 3308 ¶ 70.

both business and residential customers as their primary telecommunications services provider.

The continued feasibility and vitality of competitive entry in the Omaha MSA market for local exchange services is shown by the fact that the rapid expansion of competitive entry has occurred at the same time as incumbent charges for local services have substantially declined. The fact that competitive activity in the market is accelerating while prices for services are dropping is a strong indication that investors do not believe incumbents have an insurmountable cost advantage in the market.[57]

6. Qwest no Longer has a Dominant Market Share in the Omaha MSA

Due to this gradual and ongoing erosion of its customer base, Qwest no longer has a dominant share of the Omaha MSA market for local exchange services. This is a consequence of fierce competition in terms of price, service and bundled packages (such as Cox Communications' combination of cable television, broadband Internet access and telecommunications services).[58]

As discussed in the Teitzel Affidavit, it is difficult to identify the total CLEC market share in the Omaha MSA local services market with precision, absent proprietary customer access line data from the CLECs. However, Qwest believes that an accurate estimate can be made using the CLECs' E911 records, the number of resold lines, and the number of UNE-platform lines that currently are in service.

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[57] Exhibit B, Strategic Policy Research Study at 17-18.

[58] The market share data in Omaha undeniably support Qwest's petition for forbearance. However, nothing in this petition should be construed to imply that any particular market share loss is necessary for forbearance or non-dominance. Furthermore, nothing in this petition should be construed to imply that any particular market share loss is required in unbundling analyses, such as the necessary and impair analysis, or that market share data is appropriate for consideration in such analyses.

On this basis, it is apparent that CLECs have together captured over [redacted] percent of the residential market, over [redacted] percent of its business market, and over [redacted] percent of the combined retail local exchange market in the Omaha MSA. These totals are broken down in the following chart:

CLEC Market Share Estimate			
	Residence	*Business*	*Total*
Resold lines	[redacted]	[redacted]	[redacted]
UNE-P listings	[redacted]	[redacted]	[redacted]
E911 records	[redacted]	[redacted]	[redacted]
Total CLEC lines	[redacted]	[redacted]	[redacted]
Qwest retail lines	[redacted]	[redacted]	[redacted]
Total Omaha MSA market lines	[redacted]	[redacted]	[redacted]
% CLEC lines in Omaha MSA	[redacted]	[redacted]	[redacted]

It is also important to note that these "share" estimates do not contemplate intermodal telephone service substitutes, such as wireless and VoIP services, which are now available to customers within Qwest's service territory in the Omaha MSA.[59]

While CLEC lines and the number of wireless subscribers have increased very significantly over the last four years, the CLECs' competitive gains have come at a price to Qwest's local exchange access line base, which has declined by over [redacted] percent. The following table summarizes the significant change in Qwest's residential and business retail access line base in the Omaha MSA[60] from December 2000 to February 2004:

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[59] *See* Exhibit A, Teitzel Affidavit at 9.

[60] As stated in the Teitzel Affidavit, Qwest's service territory in the Omaha MSA includes the following Qwest wire centers in Nebraska: Bennington, Elkhorn-Waterloo, Gretna, Omaha 78th St., Omaha 84th St., Omaha 90th St., Omaha Bellevue, Omaha 135th St., Omaha Fort St.,

Qwest Retail Lines in Service[61]				
	December 2000	February 2004	Difference	% Change
Residence	[redacted]	[redacted]	[redacted]	[redacted]
Business	[redacted]	[redacted]	[redacted]	[redacted]
Total	[redacted]	[redacted]	[redacted]	[redacted]

Put another way, Qwest's residential customer base in the Omaha MSA declined by [redacted] lines – a total decrease of [redacted] percent – over the last four years. Over this same period, Qwest's business retail access line base in the Omaha MSA declined by [redacted] lines – a decrease of [redacted] percent.[62]

Given these facts, the economic analysis performed by Strategic Policy Research concludes that, "[T]he time has come in Omaha, where it is difficult to see how any disinterested analyst could conclude that Qwest is the economically dominant operator."[63]

C. Qwest No Longer Possesses Market Power In the Omaha MSA

The Commission has consistently held that a carrier is to be declared dominant only if it possesses market power in the relevant product and geographic market.[64] Conversely, a carrier

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Omaha Fowler St., Omaha 156th St., Omaha Izard St., Omaha Douglas, Omaha O St., Springfield and Valley. The following Qwest wire centers in Iowa are within the Omaha MSA: Council Bluffs Manawa, Council Bluffs Downtown, Crescent, Glenwood-Mineola, Malvern, Missouri Valley, Neola and Underwood. All Qwest retail and wholesale data presented in this document relate only to these specific Qwest wire centers. *Id.* at 2 n. 3.

[61] This figure excludes public coin and Qwest Official Company Service ("OCS") access lines. *Id.* at 3 n. 4.

[62] As the Teitzel Affidavit notes, this percentage does not account for new customers who subscribe immediately to the service of a CLEC without becoming a Qwest customer in the first instance. *See id.* at 2 n. 2.

[63] *See* Exhibit B, Strategic Policy Research Study at 4.

[64] *AT&T Reclassification Order*, 11 FCC Rcd at 3346 ¶ 138.

qualifies as non-dominant if it lacks market power in the relevant market.[65] In making a determination about whether a carrier has market power, the Commission analyzes whether the carrier has the ability to "raise prices above competitive levels and maintain that price for a significant period, reduce the quality of the relevant product or service, reduce innovation or restrict output profitably."[66]

When this standard is applied to the evidence discussed above, it is clear that Qwest does not have the ability to exercise market power in the Omaha MSA market for local exchange services. Following the approach the Commission has previously used to assess market power for other services, this market fully exhibits each of the necessary indicia of competition. As Qwest has shown above: (1) customers (*e.g.*, residential and business end users) are highly sensitive to price and other service characteristics; (2) Qwest's competitors have the ability to expand their services and capture Qwest's existing customers, and there are minimal barriers to entry; (3) Qwest's size does not provide it an insurmountable advantage and (4) Qwest has a diminishing market share.

III. THE COMMISSION SHOULD FORBEAR FROM APPLYING SPECIFIC SECTION 251(c) AND 271 REGULATORY REQUIREMENTS TO QWEST

Consistent with the high level of competition, Qwest's corresponding lack of market power, the presence of facilities-based and intermodal competitors in the Omaha MSA telecommunications market, and the decline in Qwest's market share, Qwest asks that the Commission forbear from applying certain of the interconnection, unbundling and resale

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[65] Exhibit B, Strategic Policy Research Study at 4.

[66] *See Comsat Reclassification Order*, 13 FCC Rcd at 14118-19 ¶ 67; *see also* In the Matter of The Merger of MCI Communications Corporation and British Telecommunications plc, *Memorandum Opinion and Order*, 12 FCC Rcd 15351, 15398 ¶ 124 (1997); *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20038 ¶ 101.

requirements of Section 251(c) and Section 271 to Qwest's operations in the Omaha MSA. As shown below, Qwest's forbearance request meets each of the statutory criteria established in Section 10(c) of the 1996 Act, and also satisfies Section 10(d)'s condition that these regulations have been "fully implemented" by Qwest.

A. Qwest Seeks Forbearance from the Requirements of Section 251(c) and from Specific Requirements of Section 271

Qwest requests that the Commission forbear from imposition of the requirements of Section 251(c) and the requirements that it provide nondiscriminatory access to unbundled network elements pursuant to Section 271(c)(2)(B).

B. Qwest Meets Each of the Section 10 Criteria for Forbearance

Section 10(c) of the 1996 Act requires that the Commission "forbear from applying any regulation or any provision of this [Act] to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets" if the Commission finds that:

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;[67]

(2) enforcement of such regulation or provision is not necessary for the protection of consumers;[68] and

(3) forbearance from applying such provision or regulation is consistent with the public interest.[69]

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67 47 U.S.C. § 160(a)(1).

68 47 U.S.C. § 160(a)(2).

69 47 U.S.C. § 160(a)(3).

In making the public interest determination, Section 10 requires that the Commission consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services.[70]

As shown below, Qwest satisfies each of the forbearance criteria in Section 10(c), as well as Section 10(d)'s requirement that the requirements of these provisions of Section 251(c) or Section 271 have been "fully implemented" by Qwest in the Omaha MSA.

1. Enforcement of Section 251(c) and Section 271 is no Longer Necessary to Ensure Reasonable and Nondiscriminatory Charges, Practices, Classifications and Justifications by Qwest

As discussed above, it is plain that Qwest no longer occupies the dominant market position of an ILEC in the Omaha MSA from a competitive standpoint. It is also clear that as a consequence of the intense and established status of competition in the Omaha MSA telecommunications market, Qwest no longer has either the market power or the monopoly on facilities that is assumed in Section 251(c) and in Section 271. As a result, it is no longer necessary for Qwest to meet the selected Section 251(c) and Section 271 requirements identified above in order to maintain or ensure "reasonable and nondiscriminatory charges, practices, classifications and justifications." The Commission must therefore eliminate the regulatory asymmetry between Qwest and its competitors in the Omaha MSA – which is neither sustainable nor justifiable – and grant Qwest forbearance from the specific Section 251(c) and Section 271 obligations identified above. Qwest therefore satisfies the criteria of Section 10(a)(1) of the 1996 Act.[71]

Section 251(c) requires ILECs – and only ILECs – to meet certain specified obligations

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[70] 47 U.S.C. § 160(b).

[71] 47 U.S.C. § 160(a)(1).

with respect to providing other carriers with interconnection, access to UNEs such as switching and loops, resale of their retail services, notification of interoperability changes to their facilities or networks, and with physical collocation of equipment in their facilities.[72] The express purpose of these provisions has been to prevent discrimination by the ILECs and to encourage competition by other carriers.[73] Likewise, Section 271 requires ILECs that are also Bell Operating Companies ("BOCs") – such as Qwest – to meet a checklist of Section 251(c) items as a precondition of providing in-region interLATA services. In sharp contrast to Qwest's regulatory obligations, none of Qwest's competitors are regulated as ILECs or as BOCs, and none of Qwest's competitors are subject to the unbundling requirements of Section 251(c) or Section 271.

It is clear that the Commission cannot maintain resale, interconnection and unbundling requirements that are uniquely imposed on ILECs and BOCs in markets where competition has developed to the point where the LEC/BOC is just one of several facilities-based competitors.[74] There is no reasonable basis for thinking that competition will be impaired in the event of forbearance from Section 251(c) and Section 271.[75] In such circumstances, the legal and policy underpinnings for unbundling simply no longer exist. This is true not just because of Qwest's reduced market share but also because Qwest shares the Omaha MSA telecommunications

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72 *See* 47 U.S.C. § 251(c)(2)-(6); *see also* Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., 121-22 (1996).

73 *Id.* at 117-118.

74 In *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999), the Supreme Court stressed that the Commission cannot blind itself to the availability of elements outside the ILEC's network, including self-provisioning and leasing from other providers, when implementing the Section 251 impairment standard in the *UNE Remand Order*.

market with multiple facilities-based wireline competitors, each of which has their own networks and switching capabilities, as well as a CATV-based CLEC competitor and multiple CMRS providers.

In addition, the Commission must consider the intermodal competition that Qwest faces from other service providers, such as from CATV providers that are providing CLEC services and from wireless carriers. In *USTA I*, the D.C. Circuit vacated the *Line Sharing Order*, because the Commission had "failed to consider the relevance of competition in broadband services coming from [CATV] (and to a lesser extent satellite)."[76] On remand, the Commission eliminated the duty to unbundle the high-frequency portion of the loop ("HFPL"), based in part on the existence of intermodal competition.[77] Qwest's CATV and wireless-based intermodal competitors use their own separate networks, and do not depend on Section 251(c) or Section 271 at all.

While these intermodal competitors are not legally required to provide CLECs with unbundled access to their networks, this does not justify the continued imposition of the requirements on Qwest. First, the existence of intermodal competition demonstrates that it is possible to offer service in competition with Qwest without relying on the ILEC's network.

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[75] *See, e.g., United States Telecom Association v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002), *reh'g denied en banc* (No. 00-1012, Sept. 4, 2002), *cert. denied sub nom., WorldCom, Inc. v. United States Telecom Association*, 538 U.S. 940, 123 S. Ct. 1571 ("*USTA I*").

[76] *Id.*, 290 F.3d at 428.

[77] *See* In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, 17136 ¶ 263 (2003), *vacated in part, remanded in part, and petitions for review otherwise denied, United States Telecom Ass'n v. FCC*, 359 F.3d

Where intermodal competition exists, there is "no reason to think [that requiring unbundling] would bring on a significant enhancement of competition."[78] Thus, even if a particular competitor might prefer a business plan that requires relying on the ILEC's network to offer services, the existence of intermodal competition through non-ILEC facilities demonstrates that access to ILEC facilities is not a prerequisite to competition.

In sum, Qwest's facilities are no longer a competitive bottleneck in the Omaha MSA. As discussed above, Qwest currently shares the market with several other facilities-based providers that serve as ready sources for switching, transport, resold loops and other capabilities used by CLECs. The presence of intermodal competition and established facilities-based carriers would prevent Qwest from discriminating unreasonably against other carriers, even if Qwest were inclined to do so, or leveraging the prices and availability of its own network to exclude competition.

While Qwest is seeking forbearance from certain of its resale and unbundling obligations under Section 251(c) and Section 271 of the 1996 Act, it is clear that Qwest is willing to provide other carriers with access to its network on a contractual basis. The four-year wholesale agreement that Qwest recently negotiated with MCI Communications and the line-sharing agreement that Qwest recently negotiated with Covad were both voluntary. Qwest intends to continue working cooperatively with other service providers throughout its 14-state territory, and will provide them with switching, unbundled access to network elements, and resold services.

It is also clear that forbearance from the provisions of Section 251(c) and selected

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554 (D.C. Cir. 2004), *motions to stay mandate denied, Order*, No. 00-1012 (D.C. Cir., June 4, 2004), petition for cert. due June 30, 2004 (U.S. App. No. 03A940, May 21, 2004).

[78] *See USTA I*, 290 F.3d at 429.

provisions of Section 271 will not mean that Qwest is freed from all regulation. For example, while Qwest would no longer be obligated to resell its services at a discount, it would continue to be subject to the resale requirements of Section 251(b)(1) that apply to all providers of local exchange service. Similarly, while Qwest is asking for forbearance from cost-distorting requirements that CLECs can designate any feasible point of interconnection (Section 251(c)(2)(B)), Qwest would continue to be subject to the interconnection requirements of Section 251(a)(1) that apply to all carriers.

2. Enforcement of Section 251(c) and Selected Section 271 Provisions is not Necessary for the Protection of Consumers in the Omaha MSA

It is no longer necessary to enforce the Section 251(c) and Section 271 unbundling and resale requirements in order to protect consumers in the Omaha MSA. Due to the competitiveness of the Omaha MSA telecommunications market, the presence of facilities-based competitors and the reality of intermodal competition, maximizing consumer welfare no longer depends on intensive regulation of Qwest's network. Qwest therefore satisfies the criteria of Section 10(a)(2) of the 1996 Act.[79]

As Qwest demonstrates above, Qwest no longer has a dominant market share of the Omaha MSA telecommunications market for local exchange services, and Qwest long ago lost any market power over pricing and services. Qwest's network has been overbuilt by several competitors and is no longer the sole provider of telecommunications facilities in the Omaha MSA. Therefore, Qwest does not control a competitive bottleneck. As a result of the fact that consumers have choices from carriers who are not using services available through Section 251(c) and Section 271, due to both facilities-based competitors and intermodal competition,

[79] 47 U.S.C. § 160(a)(2).

imposition of Section 251(c) and Section 271 requirements on Qwest no longer serves any consumer-protection purpose.

3. Forbearance from Provisions of Section 251(c) and Section 271 is Consistent with the Public Interest

It is also clear that the public interest will be served, and even advanced, if Qwest is granted forbearance from the requirements of Section 251(c) and Section 271. Not only will this forbearance not harm competition, but forbearance would actually benefit consumers in the long run, since it will reduce the present regulatory asymmetry between Qwest and its competitors and eliminate the economic distortions caused by the imposition of intensive regulations that apply to Qwest but that are not imposed on similarly-situated providers. Qwest therefore satisfies the criteria of Section 10(a)(3) of the 1996 Act.[80]

Section 10 requires that the Commission consider whether forbearance will promote competitive market conditions. Asymmetric regulation between service providers is not sustainable and it does not serve the public interest, either from a competitive standpoint or from a consumer standpoint.[81] At present, Qwest is uniquely burdened by dominant carrier regulations that hamper its ability to freely compete in the Omaha MSA telecommunications market for local exchange services. There is no question that allowing Qwest to compete on equal footing with

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[80] 47 U.S.C. § 160(a)(3).

[81] *See* Exhibit B, Strategic Policy Research Study at 3-4. As the Strategic Policy Research study notes, asymmetric regulation decreases the more heavily regulated entity's ability to derive advantages from their investments, and is a competitive disincentive. This in turn reduces the "vigor of the competitive process and the quality of service available to consumers." *Id.* As the study also notes, maintaining dominant carrier regulation on a non-dominant carrier will likely subvert the competitive marketplace and undermine the Commission's policy goals. *Id.* at 7, *citing* John Haring and Kathleen Levitz, "What Makes the Dominant Firm Dominant?" Federal Communications Commission, Office of Plans and Policy Working Paper Series, Number 25, 1989.

its competitors in the Omaha MSA will serve the public interest and enhance competition, and will enable Qwest to better respond to the demands of the marketplace.

From the standpoint of regulatory parity and commensurate with its diminished role in the marketplace, Qwest cannot and should not be the only facilities-based carrier that is subject to the mandatory resale and unbundling requirements of Section 251(c) and Section 271. To the extent that facilities-based providers other than ILECs do not make their facilities available to non-facilities-based CLECs, the deregulatory solution is not to maintain the existing unbundling regulations, but to eliminate them. Alternative facilities-based providers have no incentive to compete for wholesale business with ILEC facilities that must be offered at artificial prices set by regulators. The removal of unbundling requirements would allow market forces to replace regulatory impositions and create more efficient incentives for all carriers to lease their facilities to CLECs at competitive rates and prices.

The presence of intermodal competition and separate, overbuilt networks in the Omaha MSA already provides the competitive and consumer benefits that are the underlying goals of the 1996 Act. Indeed, in the context of cable, Congress has concluded that even one, partially built-out competitor offers sufficient "effective competition" to permit complete deregulation of cable.[82] By the same logic, the development of intermodal competition should, over the long term, lead to the elimination of all unbundling requirements in many markets.[83]

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[82] *See, e.g.*, 47 U.S.C. § 543(l)(1)(B)(ii) (a 15% market share by a multichannel video programming distributor other than the largest such distributor in a market qualifies as "effective competition").

[83] For example, as cable telephony becomes more widely available and wireless phones become virtual substitutes for wireline service, as they have in the Omaha MSA, ILECs will eventually lose any residual pricing power based on their status as regulated utilities even in subsidized retail markets. Once this happens, unbundling would no longer enhance competition; rather, it would only handicap ILECs in markets where they face vigorous competition for retail

C. The Requirements of Section 251(c) and Section 271 Have Been Fully Implemented

Section 10(d) of the 1996 Act provides that the Commission may not grant an ILEC forbearance from Section 251(c) or Section 271 of the 1996 Act unless and until the Commission has determined that the requirements of Section 251(c) or Section 271 have been "fully implemented" by the ILEC.[84] Both the Nebraska PSC[85] and the Commission[86] have previously determined that Qwest has fully implemented the requirements of Sections 251, 252 and 271 in the State of Nebraska, and that Qwest provides CLECs with nondiscriminatory access to its systems, databases and personnel. Separately, Section 10(b) requires that in making forbearance determinations, the Commission must consider whether forbearance from enforcing a statutory provision or regulation will promote competitive market conditions, including the extent to which such forbearance will "enhance competition among providers of telecommunications services."[87]

Read in concert, Sections 10(b) and 10(d) therefore make clear that Congress intended that the Commission have the power to grant forbearance from Section 251(c) in circumstances where an ILEC had made its network facilities available to competitors, and where granting

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customers, and stifle the potential for competition for wholesale customers. Where that is the case, as the D.C. Circuit recognized, the Act does not justify continuing "to inflict on the economy" the harms associated with unbundling requirements. *USTA I*, 290 F.3d at 429.

84 *See* 47 U.S.C. § 160(d). Qwest does not qualify for the exceptions to this rule established in Section 251(f), which are applicable only to rural telephone companies.

85 *See* In the Matter of Qwest Corporation, filing its notice of intention to file its Section 271(c) application with the FCC and request for the Commission to verify compliance with Section 271(c), *Opinion: Order Approving Qwest's 271 Application and Recommending Approval to the Federal Communications Commission*, 2002 Neb. PUC LEXIS 53 (2002).

86 *See Qwest Section 271 Order*, 17 FCC Rcd 26303.

87 *See* 47 U.S.C. § 160(b).

forbearance from Section 251(c) would serve to promote competition. Clearly, Section 251(c) and Section 271 have been fully implemented in Nebraska. On December 23, 2002, the Commission granted Qwest approval, pursuant to Section 271 of the 1996 Act to provide inter-LATA services originating in Nebraska. In that *Order*, the Commission found that Qwest met the checklist of Section 271(c)(2)(B), which included findings that Qwest is providing nondiscriminatory access to UNEs, resale, and interconnection pursuant to Section 251(c).[88] In addition, the competitive nature of the Omaha MSA demonstrates that Qwest has fully implemented the requirements of Section 251 and Section 271. The Commission would be conclusively determining that Qwest has implemented those sections if it declares Qwest to be nondominant. As a result, granting Qwest forbearance from dominant carrier regulation in the Omaha MSA should also justify a finding that for purposes of Section 10(d), the requirements of Section 251 and Section 271 have been "fully implemented" within the meaning of the statute.

From a regulatory standpoint, continuing to impose the requirements of Section 251(c) on Qwest in the Omaha MSA would be fundamentally incompatible with designating it as a nondominant and non-incumbent carrier for other purposes. Qwest's lack of market power, coupled with loss of nearly [redacted] of its market share and the established nature of its facilities-based competitors, should serve as a definitive end point for most of its Section 251(c) obligations.

IV. QWEST SEEKS FORBEARANCE FROM DOMINANT CARRIER REGULATION IN THE OMAHA MSA

Qwest also requests that the Commission forbear from regulating it as a dominant carrier in the Omaha MSA market for telecommunications services. In particular, Qwest seeks a

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88 *See Qwest Section 271 Order*, 17 FCC Rcd at 26319 ¶ 33, *et seq.*

declaration that it is not dominant in the provision of telecommunications services in the Omaha MSA and, consequently, for forbearance from dominant carrier regulation in the Omaha MSA pursuant to Section 10(c) of the 1996 Act. This forbearance request includes the following Commission regulations: (1) the requirements and procedures under Section 214 that apply to dominant carriers, (2) Sections 61.38 and 61.41-61.49, which require dominant carriers to file tariffs on up to 15-days notice with cost support;[89] and (3) Sections 61.41-61.49, and 65, which impose price cap and rate of return regulation on dominant carriers.[90]

A. Dominant Carrier Regulation is Not Necessary to Ensure that Qwest's Rates and Practices Are Just, Reasonable and Not Unreasonably Discriminatory

Dominant carrier regulation of Qwest's local telephone services in the Omaha MSA is no longer necessary to ensure that Qwest's rates and practices are just, reasonable and not unreasonably discriminatory. Qwest therefore satisfies the criteria of Section 10(a)(1) of the 1996 Act.[91]

As shown above, and as demonstrated by the attached exhibits, the Omaha MSA telecommunications market has become highly competitive. None of these carriers have market power – including Qwest – and there is no longer any regulatory justification for applying unique regulatory requirements on any single carrier as "dominant." As the Commission has recognized, it is highly unlikely that carriers lacking market power can successfully charge rates that violate the Act, since any attempt to do so will prompt customers to switch to different carriers.[92] For

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89 47 C.F.R. §§ 61.38, 61.41-61.49.

90 47 C.F.R. §§ 61.41-61.49, 47 C.F.R. § 65.

91 47 U.S.C. § 160(a)(1).

92 In the Matter of Personal Communications Industry Association's Broadband Personal Communications Services, Alliance's Petition for Forbearance For Broadband Personal

that reason, the Commission has determined that tariffing is not necessary to ensure reasonable rates for carriers that lack market power.[93]

Qwest does not possess market power in the Omaha MSA market for local exchange services. Therefore, Qwest should not be required to file dominant carrier tariffs and comply with other dominant carrier regulations, such as the rate averaging requirement. Rather, as is the case for every other non-dominant carrier in the market, Qwest should be subject to permissive detariffing, which would allow, but not require, the filing of tariffs on one-day's notice with a presumption of lawfulness and without any cost support.[94] Marketplace forces will effectively preclude Qwest from charging customers with unreasonable rates for local exchange services.

Notwithstanding the relief from dominant carrier regulations, other regulations remain and are sufficient to protect consumers from any carrier attempting to charge unreasonable rates. In particular, Sections 201 and 202 of the Communications Act require that rates and practices be just, reasonable, and not unreasonably discriminatory and would continue to apply to Qwest and all non-dominant carriers in the market.[95] The Commission can address any claims of unlawful rates or practices through the exercise of its authority to investigate and adjudicate complaints

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Communications Services, *Memorandum Opinion and Order and Notice of Proposed* Rulemaking, 13 FCC Rcd 16857, 16885 ¶ 57 (1998) ("*PCIA Forbearance Order*") (citing *CAP Forbearance Order*, 12 FCC Rcd 8596, 8608 ¶ 23 (1998); and *IXC Forbearance Order*, 11 FCC Rcd 20730, 20742-47 ¶¶ 21-28 (1996)).

[93] *CAP Forbearance Order*, 12 FCC Rcd at 8608 ¶ 23; *IXC Forbearance Order*, 11 FCC Rcd at 20742-43 ¶ 21.

[94] *CAP Forbearance Order*, 12 FCC Rcd at 8610 ¶ 27. It should be noted that the Commission tentatively concluded that it should adopt mandatory detariffing for interstate exchange access services, as it previously adopted for interexchange services. *Id.* at 8613 ¶ 34.

[95] 47 U.S.C. §§ 201(b), 202(a).

under Section 208.[96] As the Commission recently noted, Sections 201 and 202 provide important safeguards for consumers in areas that have been deregulated by the Commission.[97] In those circumstances where the Commission has reclassified carriers as non-dominant because they lack market power and reduced those carriers' regulatory burden, the Commission has continued to require compliance with Sections 201 and 202.[98]

It is also important to recognize that Qwest is not seeking relief from the obligation to make its services available for resale by other carriers. The Commission has recognized that the presence of resellers in a market exert pressure on rates.[99] In the Omaha MSA telecommunications market, where facilities-based competitive providers already have captured over [redacted] of the retail market segment, resellers have and will continue to have the ability to exert such pressure. Thus, grant of Qwest's petition would not weaken the market forces that restrain Qwest's ability to charge unreasonable rates.

B. Dominant Carrier Regulation is no Longer Necessary to Protect Consumers

The second statutory criterion for forbearance requires that the Commission determine whether dominant carrier regulation of Qwest's services in the Omaha MSA is necessary for the protection of consumers.[100] Qwest believes that the high level of facilities-based competition, the lack of entry barriers, and the vitality of existing competitors will provide all the product, price, service and choice protection that consumers need. Qwest therefore satisfies the criteria of

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96 47 U.S.C. § 208(a); *see also AT&T Reclassification Order*, 13 FCC Rcd at 3355 ¶ 160.

97 *PCIA Forbearance Order*, 13 FCC Rcd at 16872 ¶ 31.

98 *Id.* at 16866 ¶ 17.

99 *Id.* at 16874-75 ¶ 35.

100 47 U.S.C. § 160(a)(2).

Section 10(a)(2) of the 1996 Act.[101]

As demonstrated in the previous section, Qwest no longer has any market power in the Omaha MSA and currently holds less than [redacted] percent of the Omaha MSA market for residential and business telephone service. As a result, dominant carrier regulation is no longer necessary to assure that Qwest's rates and practices are just, reasonable and not unreasonably discriminatory. Because Qwest lacks market power in the Omaha MSA, rates for local exchange telecommunications services will be effectively set at competitive levels by market forces in the Omaha MSA.

Further, the requirements of Sections 201 and 202 serve as an additional safeguard for consumers. Therefore, dominant carrier regulation of Qwest also is not necessary to protect consumers from unreasonable rates or discriminatory practices. In fact, telecommunications customers in the Omaha MSA are being deprived of the full benefits of competition in the Omaha MSA market for services because of the continued regulation of Qwest as a dominant carrier. Accordingly, the second criterion is satisfied.[102]

C. Forbearance From Dominant Carrier Regulation Is Consistent With the Public Interest

The third statutory criterion for forbearance requires that the Commission determine whether forbearance from applying dominant carrier regulation to Qwest's telecommunications services in the Omaha MSA is consistent with the public interest. In making this public interest determination, the Commission considers whether forbearance will "promote competitive market conditions, including the extent to which forbearance will enhance competition among providers

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101 *Id.*

102 *Id.* at 16885 ¶ 58; *CAP Forbearance Order*, 12 FCC Rcd at 8609-10 ¶ 26.

of telecommunications services."[103] Continuing to regulate Qwest as a dominant carrier in the Omaha MSA telecommunications market would hobble Qwest's ability to compete for customers, and would continue competitive distortions that do not serve the public interest. Qwest therefore satisfies the criteria of Section 10(a)(3) of the 1996 Act.[104]

In the *AT&T Reclassification Order*, the Commission graphically described the significant costs of continued asymmetric regulation: (1) the longer tariff notices imposed on AT&T dampened its incentives to innovate because rivals could respond to innovations before they were allowed to go into effect, the so-called "first-mover advantage"; (2) the tariff filing requirements also dampened AT&T's incentives to reduce prices; (3) AT&T's competitors could use asymmetric regulatory processes to delay and undermine its initiatives; and (4) regulation imposed unique administrative and overhead costs on both AT&T and the Commission, which flowed into AT&T's prices.

Dominant carrier regulation of Qwest in the Omaha MSA market involves the same kinds of social costs. The 15-day tariff notice requirement, which applies only to Qwest, gives competitive providers the opportunity to respond to Qwest's filed rate service changes or get to market first with a new price or service offering before Qwest's tariff becomes effective. Further, as a dominant carrier, Qwest also is uniquely prohibited from responding to competition with deaveraged rates within the study area. If anything, the costs of dominant carrier regulation are compounded by the fact that Qwest is prohibited from responding to competitive providers' bundled offerings, which may include interLATA voice and data services.

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[103] *Comsat Reclassification Order*, 13 FCC Rcd at 14157 ¶ 151; *see also PCIA Forbearance Order*, 13 FCC Rcd at 16870 ¶ 27.

[104] 47 U.S.C. § 160(a)(3).

Moreover, continuing to regulate Qwest as a dominant carrier in a competitive market results in "umbrella" pricing, where competitors argue that Qwest's proposed tariff rates are unlawfully low while pricing their own services below Qwest's tariffed rates. The Commission has previously recognized that requiring tariff filings may facilitate tacit collusion by enabling carriers to "ascertain competitors' prices and any changes to rates, which might encourage carriers to maintain rates at an artificially high level."[105] In comparison, forbearance of the tariff filing requirements "will foster competition which will expand the consumer benefits of a competitive marketplace."[106] Thus, continued dominant carrier regulation of Qwest reduces the incentive of all competitors to initiate price reductions and new services and adversely affects Qwest's ability to respond quickly and creatively to competition.

Qwest is not requesting that its services in the Omaha MSA be totally deregulated. Rather, Qwest is requesting only that the Commission exercise its authority under Section 10 and forbear from applying dominant carrier regulations to Qwest in the Omaha MSA. As discussed above, like all other non-dominant carriers, Qwest will still be subject to regulation under Title II of the Communications Act. As a non-dominant carrier, however, Qwest would enjoy streamlined, reduced regulation equal to that of all its competitors in the Omaha MSA telecommunications market. This would place Qwest on equal footing with all other competitors in the Omaha MSA and will benefit consumers by permitting Qwest to be more flexible and

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[105] In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd 1411, 1479 ¶ 177 (1994).

[106] *Id.*

responsive in the way it offers its services to the public, just as other nondominant carriers.[107]

V. QWEST SEEKS FORBEARANCE FROM REGULATION AS AN ILEC IN THE OMAHA MSA

In addition to granting Qwest general forbearance from dominant carrier regulation and from the specific unbundling and resale requirements of Section 251(c) and Section 271 in the Omaha MSA, Qwest seeks forbearance from regulation as an ILEC pursuant to Section 251(h)(1) of the 1996 Act.[108] As with Qwest's other forbearance requests, this is consistent with Qwest's lack of market power in the Omaha MSA, and would help eliminate the unnecessary regulatory asymmetry that exists between Qwest and its competitors.

Pursuant to Section 251(h)(2)(A) of the 1996 Act, the Commission may designate a non-ILEC as an ILEC if (a) its position is comparable to another ILEC, (b) it has substantially replaced an ILEC, and (c) such a designation is in the public interest.[109] Based on the competitive facts of the Omaha MSA telecommunications market discussed above, the Commission could likely designate Cox Communications as an ILEC. However, after living under the onerous conditions of ILEC regulation, Qwest has no desire to impose these obligations on other carriers. The Commission has two options in this situation: (1) declare Cox

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[107] *See, e.g.*, In the Matter of 1998 Biennial Regulatory Review – Part 61 of the Commission's Rules and Related Tariffing Requirements; Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, *Report and Order and First Order on Reconsideration*, 14 FCC Rcd 12293, 12299 ¶ 16 (1999).

[108] Granting Qwest's forbearance request should have no effect on the way high cost universal service support is calculated in the Omaha MSA. Under the Commission's rules, all eligible telecommunications carriers serving lines in the service area of a non-rural ILEC receive high cost support based on the forward-looking economic cost of providing the supported services in that area, as determined by a cost model. *See* 47 C.F.R. § 54.309(a). In granting the forbearance requested in this petition, the Commission should specify that Qwest's service territory in the Omaha MSA will continue to be treated as a service area of a non-rural ILEC.

[109] *See* 47 U.S.C. § 251(h)(1).

an incumbent and forbear from ILEC regulation on both Qwest and Cox, or (2) skip the process of declaring Cox an incumbent and forbear from ILEC regulation on Qwest. The second choice is clearly the more efficient process.

It is no longer appropriate to regulate Qwest as an ILEC pursuant to Section 251(h)(1) simply because of Qwest's legacy status in the Omaha MSA telecommunications market. The underlying assumptions of Section 251(h)(1) are no longer true. As discussed above, Qwest's legacy network has been overbuilt by other facilities-based carriers. Qwest has lost over 50 percent of its residential and business customers, and no longer enjoys market power in the Omaha MSA. What is more, Cox has been designated as a second ETC in the Omaha MSA, and Qwest's network of telecommunications facilities has been overbuilt both by Cox and by AllTel and other facilities-based CLECs are utilizing their own switches in combination with unbundled loops purchased from Qwest to serve local customers.

Based on these changed circumstances, it is no longer equitable or reasonable to regulate Qwest differently than its competitors with respect to its operations in the Omaha MSA or to subject Qwest to different competitive requirements, either as a dominant carrier or as an ILEC. Qwest therefore requests that the Commission additionally forbear from regulating it as an ILEC pursuant to Section 251(h)(1).

VI. CONCLUSION

Congress adopted Section 10 because it recognized that regulation can be unnecessary and even harmful in a competitive market. Under Section 10, the Commission is required to eliminate regulations that are no longer necessary to ensure that rates and practices are just, reasonable and not unreasonably discriminatory. Qwest has gathered substantial evidence in support of its petition demonstrating that the Omaha MSA telecommunications market is

robustly competitive. In light of Qwest's lack of market power, competition, without dominant carrier regulation, is sufficient to constrain Qwest's ability to impose anti-competitive prices and other terms and conditions of service. For these reasons, the Commission should grant Qwest's petition and exercise its authority to forbear from regulating Qwest from the selected regulations under Section 251(c) and Section 271 of the 1996 Act, as well as from regulation as a dominant carrier and an ILEC in its provision of local exchange services in the Omaha MSA.

Respectfully submitted,

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EXHIBIT A

AFFIDAVIT OF DAVID L. TEITZEL

LOCAL TELECOMMUNICATIONS COMPETITIVE ENVIRONMENT: OMAHA/COUNCIL BLUFFS MSA

1. Introduction

The competitive environment has changed significantly within Qwest's service territory of the Omaha, Nebraska MSA[1] over the past four years, with customers now enjoying the ability to choose between multiple providers of telecommunications services in that market. In 2000, for example, Qwest's primary local exchange competition was represented by CLECs, with a significant proportion of CLEC competition comprised by resale of Qwest's retail services. Cox, now Qwest's most significant competitor in the Omaha MSA, was offering telecommunication service at that time but did not offer service with the scope it has today. The local exchange market in 2004 has changed dramatically, with CLEC competition moving largely away from resold services and toward services provided via CLEC-owned facilities or via wholesale unbundled network

[1] The Omaha MSA encompasses the greater Omaha, Nebraska area as well as the Council Bluffs, Iowa area.

elements (UNEs) purchased from Qwest. Additionally, intermodal competition now has a significant presence in the local exchange market in the form of wireless services and Voice over Internet Protocol (VoIP) telephony. While Qwest's local exchange access line base has declined by over [redacted] from December 2000 to February 2004,[2] CLEC lines and the number of wireless subscribers have increased very significantly, and VoIP is now a viable local service alternative for any customer with access to a broadband internet connection. The breadth of competitive alternatives in the Omaha MSA is now significant, and multiple competitors are now entrenched in that market. In this MSA, Qwest is no longer the dominant telecommunications provider.

2. Qwest's Local Exchange Base

As competitive local exchange alternatives have grown in the Omaha MSA, Qwest's local exchange access line base has rapidly eroded. Local exchange customers virtually throughout Qwest's service territory in the Omaha-Council Bluffs area now have the option of subscribing to local service from CLECs using either their own switches and network facilities or wholesale network elements purchased from Qwest. The following table summarizes the significant change in Qwest's residential and business retail access line base in the Omaha MSA[3] from December 2000 to February 2004:

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[2] This percentage does not account for new customers who subscribe immediately to the service of a CLEC without becoming a Qwest customer in the first instance.

[3] Qwest service territory in the Omaha MSA includes the following Qwest wire centers in Nebraska: Bennington, Elkhorn-Waterloo, Gretna, Omaha 78th St., Omaha 84th St., Omaha 90th. St., Omaha Bellevue, Omaha 135th St., Omaha Fort St., Omaha Fowler St., Omaha 156th St., Omaha Izard St., Omaha Douglas, Omaha O St., Springfield and Valley. The following Qwest wire centers in Iowa are within the Omaha MSA: Council Bluffs Manawa, Council Bluffs Downtown, Crescent, Glenwood-Mineola, Malvern, Missouri Valley, Neola and Underwood. All Qwest retail and wholesale data presented in this document relate only to these specific Qwest wire centers.

Qwest Retail Lines in Service[4]	December 2000	February 2004	Difference	% Change
Residence	[redacted]	[redacted]	[redacted]	[redacted]
Business	[redacted]	[redacted]	[redacted]	[redacted]
Total	[redacted]	[redacted]	[redacted]	[redacted]

While various factors have contributed to these trends, including the general economic malaise and some displacement of non-primary lines by DSL service, it is indisputable that Qwest's access line base has declined dramatically and that the bulk of this decline is driven by the increase in the number of competitive alternatives to Qwest service. These alternatives include CLEC options as well as the availability of wireless and VoIP services, which are discussed in the following sections.

3. CLEC Competitive Trends

A wide range of CLECs are now competing with Qwest in the local exchange market in the Omaha MSA, and contrary to the popular belief that the CLEC industry has undergone a "meltdown" over the last two years, the aggregate number of lines served by CLECs in Qwest wire centers in that MSA has continued to grow. A number of facilities-based CLECs including Cox Communications, McLeod, Alltel and Huntel are currently providing local exchange services within Qwest's service territory in the Omaha MSA. Additional CLECs are now competing with Qwest in the Omaha MSA via resale

[4] Excludes Public Coin and Qwest Official Company Service (OCS) access lines.

of Qwest's retail services or by the use of wholesale network elements purchased from Qwest.

The following table summarizes the change in volume in various categories of wholesale services purchased by CLECs operating in the Omaha MSA from Qwest between December 2000 and February 2004, the same time horizon shown earlier regarding the change in Qwest's retail access line base:

Qwest Wholesale Service	December 2000	February 2004	Difference	% Change
UNE Loops	**Data Redacted**	**Data Redacted**	**Data Redacted**	**Data Redacted**
UNE-Platform	**Data Redacted**	**Data Redacted**	**Data Redacted**	**Data Redacted**
UNE-Platform Directory Listings				
Residence	n/a	**Data Redacted**	n/a	n/a
Business	n/a	**Data Redacted**	n/a	n/a
Resold Lines				
Residence	**Data Redacted**	**Data Redacted**	**Data Redacted**	**Data Redacted**
Business	**Data Redacted**	**Data Redacted**	**Data Redacted**	**Data Redacted**
Local Interconnection Service (LIS) Trunks	**Data Redacted**	**Data Redacted**	**Data Redacted**	**Data Redacted**

The UNE loop data above shows that the number of lines being served by CLECs using their own switches in combination with network facilities purchased from Qwest to deliver service to the end user has more than doubled. It is important to note that the quantity of UNE loops in service does not capture any data for end users served by CLECs using CLEC-owned switches coupled to CLEC-owned loops. For example, neither end user lines served by cable telephony providers such as Cox nor end user lines

served by CLECs utilizing their own fiber networks to deliver local service to business customers are reflected in these totals.

Local Interconnection Service (LIS) trunks are network facilities that enable the exchange of traffic between Qwest and CLEC switches. As the number of end user lines served by facilities-based CLECs increases, the number of LIS trunks in service must be increased to minimize blockage of calls from CLEC customers to customers served by Qwest. LIS trunks are used by CLECs using their own loop network facilities (including coaxial loops used by cable telephone providers such as Cox) as well as those that use unbundled loops purchased from Qwest and are therefore a good barometer of the growth in the overall customer access line base served by facilities-based CLECs. It is noteworthy that the number of LIS trunks used by facilities-based CLECs has nearly doubled since December 2000 as these CLECs resized their networks to accommodate their rapidly growing customer base.

Since resale of Qwest's existing retail services represents a non-capital intensive means for CLECs to enter the market and build a core customer base, albeit with profit margin potential lower than that available via delivery of service via CLEC-owned facilities or wholesale network facilities leased from Qwest, it is not surprising that CLECs have largely moved away from resale toward other forms of local exchange service delivery. The trend in the Omaha MSA is consistent with national trends as CLECs seek greater efficiencies and margins. However, especially for new market entrants, resale remains a viable option as a means to quickly and with little investment enter any portion of the

Omaha-Council Bluffs market to attract a customer base of sufficient size to justify further investment in CLEC-owned switches and facilities.

The Unbundled Network Element-Platform (UNE-P) product has been actively used by CLECs since 2000, and the use of this service continues to increase. This service was originally used by a limited number of CLECs in Iowa, including McLeod, but has now been embraced by a greater number of CLECs, including AT&T, MCI, Sprint, Z-Tel and others as a means of delivering service to residential and small business customers, and these carriers are all now actively promoting UNE-P based services. In addition, the quantity of residential and business directory listings in the Qwest listings database associated with UNE-P lines in service in February 2004 is shown in the table. While the number of directory listings will never precisely match the number of lines in service, since some telephone numbers do not appear in the directory while others have multiple directory listings, it is noteworthy that the number of UNE-P residential directory listings is substantially greater than UNE-P business directory listings in the Omaha MSA, showing that CLECs view this wholesale service platform to be a viable means of delivering competitive local exchange service to residential customers.

Clearly, multiple CLECs have chosen to enter the local exchange market in the Omaha MSA and have done so via diverse entry strategies. The local market in this MSA is indisputably open and Qwest is no longer the dominant carrier in this market. One measure of competition in a market, albeit not the only measure, is competitor market share. While developing a precise calculation of overall CLEC market share within

Qwest service territory is difficult, as Qwest does not have access to proprietary customer information held strictly by the CLECs, an estimate can be developed using E911 residential and business customer record data reported by CLECs to Intrado, the independent E911 database administrator. The number of E911 records are not directly equivalent to the number of access lines in service, since some CLECs report Direct Inward Dial (DID) telephone numbers to Intrado (more than one DID telephone number can be associated with a single PBX trunk) and other CLECs do not report telephone numbers associated with inbound-only access lines that are incapable of originating a call to E911. However, the E911 records as a directional surrogate for the number of access lines served by facilities-based CLECs.[5] As of April 2004, facilities-based CLECs reported to Intrado a total of **[Data Redacted]** residential E911 records and **[Data Redacted]** business E911 records in the communities in the Omaha MSA.[6] These data can be combined with the CLEC resale and UNE-P values shown in the table above, coupled with Qwest retail access line data, to develop market share estimates for residential and business local exchange services in the Omaha MSA, as shown below:

[5] E911 records associated with CLEC customers served via UNE-P or resale are reported to Intrado as Qwest records. Customer records in the Intrado database identified as CLEC records are only associated with CLECs utilizing their own local switches coupled with UNE loops or CLEC-owned loops to deliver local exchange service.

[6] The Nebraska communities identified in the Intrado report in the Omaha MSA include Bellevue, Bennington, Boystown, Elkhorn, Gretna, La Vista, Offutt, Omaha, Papillion, Ralston, Springfield, Valley, Washington and Waterloo. The Iowa communities in the Intrado report include Council Bluffs, Crescent, Glenwood, Malvern, Mineola, Missouri Valley, Neola and Underwood.

	Residence	Business	Total
Resold lines	**Data Redacted**	**Data Redacted**	**Data Redacted**
UNE-P listings	**Data Redacted**	**Data Redacted**	**Data Redacted**
E911 records	**Data Redacted**	**Data Redacted**	**Data Redacted**
Total CLEC lines	**Data Redacted**	**Data Redacted**	**Data Redacted**
Qwest retail lines	**Data Redacted**	**Data Redacted**	**Data Redacted**
Total Omaha MSA market lines	**Data Redacted**	**Data Redacted**	**Data Redacted**
% CLEC lines in Omaha MSA	**Data Redacted**	**Data Redacted**	**Data Redacted**

In Table 6 of the FCC's Local Telephone Competition Report, released December 22, 2003, the FCC reported an overall CLEC market share in Nebraska of 20%[7] based on a data vintage of June 30, 2003. However, these data are statewide totals and include counts in Independent Telephone Company operating territory, and carriers with 10,000 or fewer access lines were not required to report. These data also represent a timeframe over 8 months prior to the February and April 2004 data reported above, and the Omaha MSA is much more intensively competitive than the remainder of Nebraska, since Cox (Qwest's most aggressive competitor in the Omaha MSA) is not offering service in other parts of Qwest's service territory in the state. When these factors are considered, the FCC's own data shows that the CLEC share estimate shown above is realistic and likely understated.

[7] The statewide 20% CLEC market share shown in the FCC's report for Nebraska ranks as fifth highest in the country, trailing only New York, Rhode Island, Michigan and Kansas.

It is also important to note that these "share" estimates do not contemplate intermodal telephone service substitutes, such as wireless and VoIP services, now available to customers within Qwest's service territory in the Omaha MSA. These intermodal service alternatives are discussed in following sections.

All local service providers report information to Telcordia regarding the configuration of their networks established to provide local exchange services. This information is contained in the Local Exchange Routing Guide (LERG). For example, incumbent LECs, CLECs and wireless providers all report local switches deployed in each state, the area codes and prefixes assigned to each switch, the rate centers served by those switches, type of switches deployed and the physical location of those switches. This information is used by the industry to program all switches to ensure calls to each prefix can be processed. The LERG shows a total of eight CLECs with prefixes assigned to switches serving rate centers in the Omaha-Council Bluffs MSA. In several instances, the CLEC declined to specify the type of switch used and notes simply a switch type of "digital switching system." However, the LERG shows that one DMS 500, one DMS 100/200 and one 5ESS switch are located in Omaha to serve this market. A DMS 500 and DMS 100/200 can each serve a maximum of 100,000 access lines, while a 5ESS can serve 200,000 access lines. In other words, these three Omaha CLEC switches alone can accommodate approximately 400,000 end user lines, which is nearly double the number of facilities-based CLEC lines in currently in service in the Omaha MSA. The unidentified switches of the other Omaha CLECs are in addition to that capacity.

Clearly, there is ample capacity in CLEC switches now deployed to serve the Omaha MSA to absorb significant additional line growth.

While Qwest is experiencing competitive pressure from a number of CLECs in the Omaha MSA, Cox, McLeodUSA and Alltel are currently the most significant in this geographic area. The following sections describe the scope of these competitors' operations, with particular emphasis on Cox, which has succeeded in deeply penetrating the local exchange market in the Omaha MSA.

Cox

In February 2004, Cox Communications announced it is now serving one million digital telephone subscribers nationwide: "Cox's successful seven-year history of providing primary line telephone service is key to its bundling strategy and has resulted in more than one million telephone customers. In Cox's most mature markets, one in three homes subscribe to Cox Digital Telephone."[8] In reporting fourth quarter and full year financial results for 2003, Cox stated:

> We grew our Cox Digital Telephone customer base by 38 percent in 2003, with a record number of new phone subscribers added in the fourth quarter. Cox's telephone service is now available to 48 percent of our homes passed, and we will use VoIP technology and our IP backbone to further expand our footprint during 2004.[9]

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[8] *Cox Communications Surpasses Five Million Digital Service Subscriptions*, February 12, 2004, www.cox.com, visited February 27, 2004. Since Cox began offering telephone service in Omaha in 1998, it can reasonably be concluded that Omaha falls within this category.

[9] *Cox Communications Announces Fourth Quarter and Full-Year Financial Results for 2003,* www.cox.com, visited February 27, 2004.

According to Cox's website, the company offers Digital Telephone Service in the following exchanges in Nebraska and Iowa: Bennington, Elkhorn, Gretna, Omaha, Valley, Waterloo, Carter Lake, Council Bluffs, and Crescent.[10] Attachment 1 to this Exhibit is a page from Cox's website which describes the local calling areas for each of these exchanges.

In an investor meeting held on May 9, 2002, Cox described its Omaha operation, stating its mission for the area is "to be the premier provider of voice, video and data in the markets we serve ... while operating in a head-to-head competitive environment." Cox stated that as of April 30, 2002, the Omaha system was comprised of 295,863 serviceable homes, 360,000 total residential RGUs,[11] and 7,587 commercial customers. At that time –two years ago - Cox estimated its residential telephony market share to be 26.5%. At the conference, Cox reported that residential telephony penetration was approaching 50% of its basic cable customer base in Omaha.

Cox also informed the investor community that its retail stores generate 15% of connects, with 5% of connects coming through its partnership with Buffet-owned Nebraska Furniture Mart. At that time (May 2002), Cox indicated it had 25 retail outlets in the Omaha area. Cox has experienced a consistent growth rate of one percent per month in its product bundles, with 44% of its customers owning a bundle of services.[12] The company found that customers with three-product bundles are five times less likely to

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[10] www.cox.com/Omaha/telephone/localareas.asp, visited April 16, 2004.

[11] A Cox acronym representing Revenue Generating Units, which are essentially households that are potential or current Cox customers within the defined market.

[12] Cox Communications Omaha Investor Meeting, May 9, 2002.

leave than others.[13] Omaha customers who subscribe to a three-product bundle consisting of Cox Digital Telephone, Cox High-Speed Data and Cox Cable TV receive discounts off the standard individual rate. Customers may choose to receive $10 off their entire bill or one free primary access line of Cox Digital Service.[14]

Cox entered the business telephony market in Omaha in June 1998, primarily focusing on small-to-medium businesses.[15] Cox's strategic objective is to "own the business customer relationship for all services Voice-Video-Data."[16] As of year-end 2002, Cox Business Services was realizing almost $1.2M per month in revenue, from almost 16,000 business customers. Sixty-eight percent of its revenue was from switched telephone, three percent from unswitched telephone, 27% from data, and two percent from "other."[17]

Cox also described its Omaha network for investors as having the following attributes:

- 4,000 Network Miles
- Fully certified for Video, Telephone and High Speed Data
- One Master Telecommunications Center and 6 Secondary Centers (in North Omaha, Council Bluffs, South Omaha, Bellevue, West Omaha, and Elkhorn)
- High Reliability

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13 *Id.*
14 Nebraska PSC Tariff No. 1, Page No. 108, Effective October 6, 2000.
15 *Id.*
16 *Id.*
17 *Id.*

Cox concluded its presentation to investors by affirming that it is "positioned to take advantage of new services, and for continued growth." Cox's stated "continued growth" objective is affirmed in its Form 8-K SEC filing submitted on April 29, 2004. In that filing, Cox reported it "added 78,959 Cox Digital Telephone customers, ending the quarter with 1.1 million telephone customers, representing year-over-year customer growth of 36%." While these data represent results from Cox's operations across the country, they suggest that Cox is adding telephone subscribers at a very robust pace, in marked contrast to subscriber access line trends of the incumbent LECs.

Cox offers a wide range of services to residential and business customers. In addition to stand-alone access lines, Cox offers residential customers a variety of popular calling features including Voice Mail, Call Forwarding, and 3-Way Calling, just to name a few. For Cox customers purchasing another Cox service, residence access lines are available for $15.89 per month in Nebraska and $11.39 per month in Iowa. Second lines are available for $7.89 per month in Nebraska and $6.50 per month in Iowa.[18] Prices for non-Cox residential customers are $17.65 per month for the first line and $16.35 per month for the second line in Nebraska and $12.65 per month for each line in Iowa.[19] Installation of phone jacks and inside wiring is also available from Cox.[20] In addition, wire maintenance plans are available, as are packages such as the Connection 60 Package (consisting of one phone line, the Solutions feature package and long distance for $29.95 per month) and the Connection Unlimited Package. Priced at $49.95 per month, this

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18 www.cox.com/Omaha/telephone/Pricing.asp, visited April 16, 2004.

19 *Id.*

20 https://orders.cox.com/DigitalTelephone/feature_selection.asp, visited April 16, 2004. Inside wire and jacks may also be installed by the building owner, by an electrician, or by an independent contractor.

package includes the phone line, the Control Plus feature package, Voice Mail, and unlimited long distance calling within the United States.[21] Features are available on a stand-alone basis, without the requirement to purchase a package of services, if that is the customer's preference.[22]

Cox's Local Exchange Service includes Basic Residential Service, Basic Business Service, PBX Service (trunks), Centrex Service, ISDN-PRI, and Message Telecommunications Service.[23] Other services available from Cox include Directory Assistance, Operator Assistance, Directory Listings, Emergency Services, Vanity Telephone Numbers, and miscellaneous services such as Toll Restriction, Temporary Suspension of Service – Customer Initiated, and Number Referral Service. Cox also has tariffs on file with state commissions for Switched Access and Dedicated Transport (Nebraska PSC Tariff No. 2 and Iowa Tariff No. 2).

Attachment 2 to this Exhibit provides maps depicting the geographic coverage of Cox's footprint in the Omaha/Council Bluffs area. The maps were developed by Qwest and are based on publicly available information regarding telephone service availability from the Cox web site. The area bordered by the gold line represents the boundary of the Omaha MSA, which contains territory served by Qwest (primarily the greater Omaha and Council Bluffs areas) as well as areas served by Independent Telephone Companies. The areas shaded in red, which overlay Qwest's service territory in the Omaha-Council Bluffs

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21 www.cox.com, visited April 16, 2004.

22 www.cox.com/Omaha/telephone/pricing.asp, visited April 16, 2004.

23 Nebraska PSC Tariff No. 1, Iowa Tariff No. 1.

MSA, are areas in which Cox offers the "triple play" - cable television, cable modem and telephone service.

Late last year, Cox announced it is experiencing record growth in revenue and customer locations in the business market through its commercial broadband division.[24] "Cox is in a unique position in the commercial services arena," said Bill Stemper, vice president of Cox Business Services in Atlanta. "All of our pieces --- from the network we own and manage, to our architecture with built-in reliability to the business solutions and expertise we offer to small- and medium-sized business owners and enterprise alike --- contribute to the sense of trust that our customers have with us."[25]

Cox has great breadth in its customer base, which encompasses residential subscribers, enterprises, small and medium businesses as well as government properties and teleworkers/home offices. Many school systems and air force bases, hospitals, enterprise and airports, law firms and teleworkers trust Cox for the delivery of circuit-switched telephone and long distance services, high-speed Internet access, web hosting, VPN and data transport services. Approximately 40 percent of Cox's commercial services customers choose to bundle their voice and data services, according to company research.[26]

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[24] A Cox customer location is a single business location with one or more active Cox data, voice or transport services on one or more accounts. Video-only business customers are not included in these figures.

[25] www.coxbusiness.com/PR/03-1027.html, visited March 1, 2004.

[26] *Id.*

Attachment 3 to this Exhibit contains advertisements in which Cox promises businesses they can save up to 20% by subscribing to Cox communications packages. Business local lines are available for $26.89 per line per month in Omaha and $28.50 in Council Bluffs and other Iowa communities served by Cox. Trunks are offered for $37.50 per month in Omaha and $28.50 in Iowa. Term discounts are available. The Cox Office Solutions Pak ("COSP") offers business customers in Omaha a bundled package term plan of one or three-year commitments. The package combines telephony services, including two flat-rated business access lines, eight custom calling features, a block of 200 minutes of interstate and intrastate long distance calls, with Cox's high-speed Internet access service. The total package is priced at $88.10 per month with a one-year contract or $76.74 per month for a three-year contract. Customers who enter into the three year contract do not pay installation charges which amount to $250 with a one-year contract.[27] Additional packaged offerings are available to Cox business customers.

Cox regularly makes promotional offerings available to Omaha-area consumers. For example, Cox has offered free activation to residential customers who subscribe to Cox Digital Telephone Service via the company's website[28], three months free service to new residential customers[29], up to three months free service plus free features and free installation to business customers who switch to Cox[30], and a $100 gift card to current

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27 Nebraska PSC Tariff No. 1, Pages 109 and 110, Effective March 24, 2003.

28 Free Activation with Online Ordering, Nebraska PSC Tariff No. 1, Page No. 102.1, Effective August 18, 2003.

29 Three Months Free MRC, Cox Nebraska PSC Tariff No. 1, Page No. 102.2, Effective September 1, 2003.

30 www.coxbusiness.com/systems/ne_omaha/Jan_04/index_omaha.html, visited April 16, 2004.

Cox Business customers for referrals resulting in a sale[31]. These are just a few of the numerous incentives Cox offers to current and prospective customers.

Another example of the flexibility Cox enjoys in the marketplace is evident in Cox's Iowa Tariff No. 1. That tariff indicates Line Connection Charges may be waived *in competitive situations* (emphasis added).[32] According to Cox's tariff on file with the Iowa Board, the normal line connection charge is $40.00 for Business customers and $29.95 for Residence customers.[33]

Cox regularly positions its services as having greater value than the services provided by Qwest. For example, on its website, Cox compares the price of Cox's lines and features to those offered by Qwest, and calculates the "percent savings" for consumers who sign up with Cox. A sample is included as Attachment 4 to this Exhibit. Cox has been aggressive in promoting its services via door hangers in the Omaha area, especially in areas where Qwest is deploying DSL capability. For example, Qwest was provided a Cox door hanger that was left at the front door of an Omaha resident on April 20, 2004 promoting a bundled Cox service offering consisting of cable television service priced at $19.08, high speed internet service priced at $19.99 and telephone service priced at $2.25 (the low telephone service price is only available if purchased as part of the bundle of Cox services).

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31 www.coxbusiness.com/referabiz, visited April 16, 2004.

32 Iowa Tariff No. 1, Page No. 64, Effective September 28, 2003.

33 *Id.*

McLeodUSA

McLeodUSA's fiber optic network spans 25 states, providing local, long distance, wireless, data and Internet service to rural and metropolitan areas. The company owns, operates, and maintains a full range of facilities on a national basis, including 44 voice switches.[34] In February, 2004, McLeodUSA reported year-end 2003 results, including the following customer platform statistics:[35]

2003	2002
* 65% - UNE-L[36]	* 52% - UNE-L
* 5% - Resale	* 15% - Resale
* 30% - UNE-M/P	* 33% - UNE-M/P

McLeodUSA also reported a reduction in revenue from the previous year, "primarily driven by the FCC mandated reduction in access billing rates and a lower customer base, of which approximately 28,000 customers valued at $9.5 million of revenue resulted from the Company's intentional drive to eliminate non-profitable customers."[37] It's apparent that McLeodUSA is not subject to Provider of Last Resort requirements such as those imposed upon Qwest and is able to selectively choose the customers it serves.

On January 21, 2004, McLeodUSA announced plans to deploy the next generation of Preferred Advantage services utilizing Internet Protocol (IP) technology. The new

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34 www.mcleodusa.com, visited March 1, 2004.
35 *McLeodUSA Reports Fourth Quarter and Total Year 2003 Results*, February 18, 2004.
36 These lines are provisioned through McLeod switches.
37 *McLeodUSA Reports Fourth Quarter and Total Year 2003 Results*, February 18, 2004.

Voice-over-IP ("VoIP") platform will be launched early in the second quarter across the McLeodUSA network to initially offer McLeodUSA business customers an enhanced set of flexible features for their local, long distance and Internet services via McLeodUSA's highly successful Integrated Access product. McLeodUSA will also utilize VoIP to lower cost and enhance other Preferred Advantage services for both residential and business customers in the near future.[38]

McLeodUSA has been named the primary local telecommunications provider for 538 Walgreens stores with nearly 5,000 business lines in its 25-state footprint.[39] K-Mart has also chosen McLeodUSA to provide local telephone services to 176 locations, including two distribution centers, in fourteen Midwestern and Western states.[40] Section 5 of McLeodUSA's Nebraska Tariff No. 3 and Iowa Utilities Board No. 4 lists the cities and wire centers where McLeod is offering service, either over its own switch or through the use of network elements. The Tariffs demonstrate McLeodUSA is offering residential and business service in the Omaha MSA.

McLeodUSA offers residence and business customers stand-alone as well as bundled offerings. The rate for a stand-alone residential access line in Council Bluffs is $21.95

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[38] *McLeodUSA Reports Fourth Quarter and Total Year 2003 Results*, February 18, 2004.

[39] *McLeodUSA Selected as Primary Local Telecommunications Services Provider by Walgreens*, April 28, 2003;

[40] *McLeodUSA Selected as Primary Local Telecommunications Services Provider by Kmart*, August 11, 2003.

per month. In Omaha, the monthly rate is $23.95. The rate for a stand-alone business access line in Omaha and Council Bluffs is $31.95 per month.[41]

In late 2002, McLeodUSA launched its Preferred Advantage[sm] portfolio of residential bundled packages in Iowa and Nebraska. [42] The "Value Preferred Package" for residence customers, consisting of local line switched service, Call Waiting, Three Way Calling, Call Forward Variable, Caller ID, Anonymous Call Rejection, Call Waiting ID, 900 Blocking, and a primary directly listing, is available for $34.95 per month in Omaha and $36.95 in Council Bluffs. The "Premium Preferred Package," including residential local switched service, Call Waiting, Three Way Calling, Call Forward Variable, Caller ID, Anonymous Call Rejection, Call Waiting ID, 900 Blocking, Last Call Return, Continuous Redial, Call Screening, Speed Call 8, and a primary directory listing, is priced at $37.95 per month in Council Bluffs and $38.95 in Omaha.[43]

In July 2003, McLeodUSA launched its Preferred Advantage[sm] integrated access service platform geared toward small and medium-sized business customers with 6 – 20 voice lines. The product allows businesses to combine local, long distance and Internet services over a dedicated, digital facility.[44] The "Simple Preferred Package" for Small Businesses consists of a local switched line and three features for $31.95 per month in

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41 Tariff Iowa No. 4, Sheet No. 66, Effective February 18, 2004, Sheet No. 68, Effective February 18, 2004; Tariff Nebraska No. 3, Sheet No. 101, Effective January 30, 2004, Sheet No. 98, Effective January 30, 2004.

42 *McLeodUSA Expands Residential Communications Services Into Eight Additional States*, April 2, 2003.

43 Tariff Nebraska No. 3, Sheet No. 101, Effective January 30, 2004, Tariff Iowa No. 4, Sheet No. 68, Effective February 18, 2004.

44 *McLeodUSA Launches Preferred Advantage[sm] Integrated Access Service Platform*, July 22, 2003.

Omaha and Council Bluffs.[45] Additional packages are available at incrementally higher rates, based on the number of features included in the package. In addition to the above-referenced services, McLeodUSA offers Intercept Services, Local T1 Service, Dynamic T-1 Service, PRI ISDN, Directory Service, Conference Calling Service, Directory Assistance, Operator Services, Long Distance and 800 Services, Market Expansion Line, and Private Switch Automatic Location Identification. Furthermore, McLeodUSA offers trouble isolation and inside wire care plans to its customers.

Promotional offerings and term and volume discounts are also available.[46] McLeodUSA's Nebraska tariff detailing its flexibility to promote reads as follows:

> McLeodUSA may from time to time engage in special promotions of limited duration. These promotions may be in the form of waiver or reduced recurring and nonrecurring fees, lowered usage charges, or other actions designed to attract new customers or to increase existing customer awareness of a particular service. All promotions will be offered on a non-discriminatory basis to eligible customers.[47]

Alltel

Alltel Communications of the Midwest ("Alltel") was certified by the Nebraska PSC on March 10, 1997[48] as a CLEC and has the authority to offer local service anywhere in the state. Alltel is a full service provider, offering residential and business local exchange service, DSL, long distance and wireless services to customers in the Omaha area. In the

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45 Tariff Nebraska No. 3, Sheet No. 98, Effective January 30, 2004; Iowa Tariff No. 4, Sheet No. 86, Effective February 18, 2004.

46 Tariff Nebraska No. 3, Iowa Tariff No. 4.

47 Tariff Nebraska No. 3, Sheet No. 60, Effective March 28, 2004.

48 Application No. C-2544.

Commission's Annual Report to the Legislature on the Status of the Nebraska Telecommunications Industry, released in September 2003, Alltel is reported as the second largest local exchange carrier in the state with a total of 274,416 access lines (24.7% of the access lines in the state) as of February 2003. Far from being a relatively small Independent, it has significant operational scale and scope, and Alltel reports in its web site that it is:

> "a customer focused communications company with almost 13 million customers and $8 billion in annual revenues. Alltel provides wireless, local telephone, long distance, Internet and high-speed data services to residential and business customers in 26 states."[49]

Alltel has operated traditionally as an Independent LEC in Nebraska, but reported to the PSC for the annual report that it now serves 3,152 residential and 19,184 business lines as a CLEC in the state, primarily in Qwest's service territory in the greater Omaha area.

Alltel offers ala carte services, but also emphasizes service bundles to Nebraska customers as is typical of service offerings of Qwest and CLECs serving the state. In fact, Alltel offers a total of six primary packages, including the Caller ID Package, the Complete Package, Basic Connections, Preferred Connections, Web Connections and DSL Connections[50] which are built upon Alltel's ability to integrate local service, long distance, calling features and internet access for its customers. Integration of this sort is widely recognized in the telecommunications industry as being a key to meeting customer demands and thereby enhancing the provider's opportunity for market success.

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49 http://www.alltel.com/news_information/newscenter.html, visited May 24, 2004.

50 www.alltel.com/estore/local/alltelbundles/index.html, visited May 24, 2004.

4. Wireless Service

In its most recent Local Telephone Competition report, the FCC showed a total of 900,744 wireless subscribers in Nebraska as of June 2003.[51] In the same report, the FCC showed a total of 775,829 ILEC (Qwest and Independents combined) access lines in service for the same month. In other words, the number of wireless subscribers now exceeds the total number of ILEC switched access lines in service in the state. Wireless phones are now widely accepted by business and residential consumers for voice telephony. In addition, wireless providers are now augmenting their services with data applications such as dial-up wireless internet access, text messaging and image transmission to bring additional functionality to their services to attract and retain customers. Clearly, a segment of the Qwest customer base views wireless service as an acceptable alternative to primary or additional wireline access lines, and this segment has contributed to the decline in Qwest's retail access line base.

A wide range of wireless providers is now offering service within Qwest territory in Nebraska, including such significant carriers as Verizon, Sprint, AllTel, Cricket, Nextel, U.S. Cellular and MCI. Service is available from at least one of these carriers in every Qwest wire center in the Omaha MSA. Each of these carriers has significant scale and scope and is actively promoting the availability of its service to customers in the state.

On November 24, 2003, wireless number portability was implemented in response to an FCC mandate. Wireless number portability will not only enable wireless subscribers to

[51] FCC Local Telephone Competition Report, Table 13, December 22, 2003.

retain a preexisting wireless telephone number when changing wireless service providers, it will also enable customers to retain a preexisting wireline telephone number when the customer elects to disconnect the wireline service entirely and rely solely on wireless service as the customer's primary telecommunications service. This event removes a barrier that may have prevented some wireline customers from "cutting the cord" and substituting wireless service for traditional Qwest wireline telephone service. Research released in January 2004 by Advantis[52] assessed the impact of wireless number portability on the proportion of residential wireline customers willing to completely substitute wireless service for traditional wireline local exchange service. Advantis found that, assuming availability of a wireless plan priced at $40/month and containing 600 plan minutes, 6.4% of the respondents reported a willingness to completely substitute wireless for wireline service without number portability. When the respondent was informed of the availability of wireless number portability, the percentage of respondents willing to "cut the cord" increased to 11.5%. On a nationwide basis, Advantis projects that wireless service will erode the wireline telephone base at an increasing rate and predicts that 6 million wireline telephone lines will be displaced by 2007 and 14 million by 2009.

Wireless companies offer a variety of plans - local plans, regional plans, and national plans – with varying amounts of minutes included. Generally, wireless packages including long distance and features start as low as $20.00 per month. As a point of comparison, consider that in Nebraska Qwest's flat-rated local exchange residence line is priced at $23.22 ($18.15 basic rate within the base rate area plus $5.07 Subscriber Line

[52] Mobile Metrics: Wireline to Wireless Displacement Study (Advantis: January 2004). This research was a telephone survey of 1,000 residential households in the top 100 MSAs and was conducted in November and December 2003.

Charge), excluding any charges for features or intraLATA long distance. The comparable Qwest business rate is $32.62 ($27.55 within the base rate area plus the $5.07 Subscriber Line Charge). Verizon offers customers within its service territory in Nebraska (including the Omaha MSA) a $34.99 per month plan which includes 400 "whenever" minutes, unlimited weekend minutes, VoiceMail, Caller ID, Call Waiting, Call Hold, and nationwide long distance.[53] Cricket offers unlimited local calls to Omaha consumers for $35.99 per month, including VoiceMail, Caller ID, Call Waiting and Three-Way Calling features.[54] Alltel offers the "Local Freedom" plan in the Omaha MSA for $39.95 per month, which includes 700 "anytime" minutes, unlimited night/weekend calling, VoiceMail, Caller ID, Call Waiting and Three Way Calling.[55] Sprint offers a "Free and Clear" plan that includes 300 anytime minutes, unlimited night and weekend minutes, nationwide long distance, voice mail, Three-Way Calling, Caller ID and Three Way Calling for $35.00per month.[56] These examples represent only a very small number of the wireless plans and services that are available to consumers and businesses in the Omaha MSA. For small business and residence customers that that have communications needs that can be satisfied by the service attributes offered by the wireless carriers, a few of which are shown in the above examples, wireless service is clearly an attractive alternative to Qwest's wireline service.

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53 www.verizonwireless.com visited 4/20/04.
54 www.cricketcommunications.com, visited 4/21/04.
55 www.alltel.com, visited 4/21/04.
56 www.nextel.com, visited 5-4-04.

5. Voice over Internet Protocol (VoIP) Telephony

Voice over Internet Protocol (VoIP) service is quickly evolving as a direct substitute for Qwest wireline telephone service, and the service functions in a manner very similar to standard telephone service familiar to Qwest's customers. For example, the VoIP customer utilizes a standard telephone set to originate and receive telephone calls, and the dialing patterns are identical to standard wireline telephone service. The customer's telephone set is simply plugged into an interface device that enables the telephone call to be processed over a broadband connection via the Internet. Currently, VoIP providers do not pay Switched Access charges for origination of this type of traffic, enabling VoIP providers to offer very low long distance rates.[57] For example, Vonage offers free long distance within the continental United States and Canada, and international long distance rates from the U.S. are priced as low as $0.02 per minute. Typically, long distance carriers charge $0.30 per minute or more for the same call.

Qwest is aware of at least seven vendors now offering VoIP telephony applications to consumers in Nebraska. AT&T offers a "suite" of VoIP products for business customers and is in the process of rolling out its residential service entitled "CallVantage." While not yet available in Nebraska, the company plans to offer CallVantage in 100 major markets by the end of 2004.[58] Five Star Telecom is also a provider of VoIP products and services, offering service under the "earthphone" trade name. In addition, Vonage,

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[57] Qwest recently announced it is eliminating connection fees carriers pay when their customers make Internet-based phone calls to Qwest local-telephone customers in a move to promote true VoIP services.

[58] *AT&T will offer Internet phone calls in selected markets*, Wall Street Journal, March 31, 2004.

Packet8, VoicePulse,[59] BroadVoice, and Zipglobal offer telephony services utilizing VoIP technology.

VoIP services are priced competitively with Qwest wireline services, especially for customers with existing broadband internet access. Vonage offers a "Residential Premium Unlimited Plan" priced at $30.00[60] per month that includes unlimited local and long distance calling within the U.S. and Canada, free Call Waiting, Voice Mail, Call Forwarding, Repeat Dialing, Call Transfer, Caller ID, and Three-Way Calling. Alternatively, residential customers may subscribe to Vonage's "Unlimited Local/Regional Plus Plan" and receive unlimited local and regional service plus 500 nationwide and Canada long distance minutes, as well as all of the features included in the Premium Unlimited Plan for $24.99 per month. Vonage's "Small Business Unlimited" plan, priced at $49.99 per month, provides unlimited local and long distance calling within the U.S., as well as a free fax line, free Call Waiting, Voice Mail, Call Forwarding, Repeat Dialing, Call Transfer, and Caller ID Blocking. The "Small Business Basic Plan" provides all the same free features as the Small Business Unlimited Plan, with 1500 local and long distance minutes for $39.99 per month. In addition, Vonage allows its customers to select the area code they would like assigned to them. For example, a Vonage customer doing significant business volumes with Los Angeles customers may elect a Los Angeles area code. By so doing, all calls from Los Angeles

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[59] VoicePulse service is available anywhere in the country where broadband Internet access is available, however, it is currently not offering numbers within Nebraska area codes.

[60] Vonage announced on May 17, 2004 that it was reducing its unlimited calling plan from $35.00 to $30.00. Vonage CEO Jeffrey Citron stated that the reduction was due to the company hitting and "inflection point, where its growing base of users had allowed it to lower costs and pass along some savings to customers." *Internet Phone Service Vonage Hits 155,000 Users*, Reuters, May 17, 2004.

customers to the Vonage customer are toll-free. Consumers subscribing to Vonage's service may also elect to keep their current phone number.

Another example of a VoIP service provider is Packet8. This VoIP provider offers its "Freedom Unlimited" residential plan for $19.95 per month. This plan provides several features and unlimited calling to anyone in the 50 states and Canada and Packet8 subscribers worldwide. Packet8's "Virtual Office" plan, priced at $39.95 per month, also includes business class voice mail, an auto-attendant to answer calls, conference call bridge service, hold music, three-digit dialing, as well as unlimited calling plans to the United States and Canada. Similar to the Vonage offering, Packet8 allows the customer to select the geographic "rate center," which allows incoming calls from customers in that geographic area to call the Packet8 customer toll-free. Calls between Packet8 customers anywhere in the world are always free.

As stated previously, Qwest's stand-alone basic exchange rate, excluding features and long distance, is $23.22 for residence and $32.62 for business. For Qwest's residential and business customers with access to a broadband Internet connection and who use calling features and make long distance calls, these services represent a viable and price-competitive alternative to traditional local exchange service.

It is clear that the competitive paradigm is changing in the local exchange market. Recently, there have been a number of public announcements regarding VoIP deployments demonstrating that carriers are now very serious about utilizing this

alternative technology to capture and retain customers. Qwest became the first regional Bell operating company to offer residential telephone service using VoIP technology, with a roll-out of the service in Minnesota in early December 2003. Also, within the past several months carriers such as Verizon Communications, SBC, BellSouth, and Time Warner announced plans to begin offering or broaden existing VoIP offerings. Vonage announced that it has struck an agreement with Circuit City stores across the country to market its services.[61] Packet8 just announced that it is interconnecting its VoIP network with FreeWorld Dialup, the world's leading free Internet Telephony community.[62] This will allow subscribers to Packet8's service to call or be called by FreeWorld Dialup subscribers. "The interconnection of voice over IP networks is a trend that will continue as more and more people incorporate VoIP calling into their lives," according to Bryan R. Martin, Chairman and Chief Executive Officers of 8 x 8, Inc. "We expect to see much more activity in this area in the near-term, as VoIP telecommunication service providers like Packet8 endeavor to lower the call routing costs for their customers even further. VoIP interconnects also improve the voice quality over that possible on switched networks, so consumers will finally start to hear what they have been missing on the legacy telephone network," Mr. Martin concluded.[63] InfoTech, a research and consulting firm, projects that over two-thirds of U.S. Small and Mid-Sized Business Centrex users will convert to IP Telephony by the year 2008.[64]

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61 *Internet Phone Service Slowly Enters Mainstream*, San Jose Mercury News, April 6, 2004.

62 *Packet8 and FreeWorld Dialup Now Offer Free Unlimited Calling Between Subscribers*, PR Newswire, March 30, 2004.

63 *Id.*

64 *Small Businesses Set to Abandon Centrex – InfoTech Sees Broad SMB Shift to IP Telephony*, Market Wire, Incorporated, April 30, 2004.

While empirical evidence of competition for Qwest's local exchange services has in the past focused primarily on traditional wireline CLEC-based competition, the growing presence of VoIP services, as well as wireless services, is a further indication that the competitive paradigm is changing and additional local retail service options for consumers in the Omaha MSA are now available.

6. Conclusion.

The Omaha MSA is now one of the most competitive markets in Qwest's fourteen state region. Major CLECs, including Cox, Alltel and McLeod, have deeply penetrated the local exchange market in the Omaha-Council Bluffs area and have contributed directly to the reduction of over **[Data Redacted]** in Qwest's retail access line base in this MSA. Intermodal competition is also a significant factor in the Omaha MSA. There are currently at least seven wireless providers serving the Omaha-Council Bluffs market, and according the FCC's Local Competition Report, wireless subscribers now outnumber traditional landline access lines in Nebraska. With the advent of wireless number portability in November 2003, landline customers are now free to retain their preexisting telephone numbers when electing to subscribe only to cellular/PCS service for their communications needs. Number portability will accelerate the trend of displacement of landlines with cellular phones. Additionally, VoIP service is available from at least seven providers to any residential or business customer in the Omaha MSA with access to a broadband internet connection. VoIP is emerging as a viable substitute for traditional local exchange and long distance services and is being embraced by major

telecommunications providers as a core telecommunication service platform. In small business and residential applications, VoIP services can easily be self-installed by the customer in as little as ten minutes. Clearly, VoIP is a present and ever-increasing competitive factor in the local exchange market in the Omaha MSA.

The range of competitive options available to customers in the Omaha MSA has resulted in a steep erosion in Qwest's retail access line base, and Qwest is no longer the dominant carrier in this market. In view of this range of competitive alternatives, Qwest must be reclassified by the FCC as non-dominant in the Omaha MSA.

Exhibit A
Teitzel Affidavit
Attachment 1

Digital Telephone

COX Digital Telephone

Local Calling Areas

Exchange	Local Calling Areas
Bennington	Arlington, Blair, Ft. Calhoun, Fremont, Kennard, Louisville, Omaha (including Carter Lake, IA., Elkhorn, Gretna, Springfield, Valley, Waterloo), Yutan.
Elkhorn	Arlington, Blair, Ft. Calhoun, Fremont, Kennard, Louisville, Omaha (including Bennington, Carter Lake, IA., Gretna, Springfield, Valley,Waterloo), Yutan.
Gretna	Arlington, Blair, Ft. Calhoun, Fremont, Kennard, Louisville, Murray, Omaha (including Bennington, Carter Lake, IA., Elkhorn, Springfield, Valley, Waterloo), Plattsmouth, Yutan.
Omaha	Arlington, Bennington, Blair, Carter Lake, IA., Council Bluffs, IA. (including Carson, IA., Crescent, IA., Underwood, IA.), Elkhorn, Ft. Calhoun, Fremont, Glenwood, IA., Gretna, Kennard, Louisville, Macedonia, IA., Minden, IA., Mineola, IA., Missouri Valley, IA., Murray, Neola, IA., Oakland, IA., Plattsmouth, Silver City IA., Springfield, Tabor, IA., Treynor, IA., Yutan, Valley, Waterloo.
Valley	Arlington, Blair, Ft. Calhoun, Fremont, Kennard, Louisville, Omaha (including Bennington, Carter Lake, IA., Elkhorn, Gretna, Springfield, Waterloo), Yutan.
Waterloo	Arlington, Blair, Ft. Calhoun, Fremont, Kennard, Louisville, Omaha (including Bennington, Carter Lake, IA., Elkhorn, Gretna, Springfield, Valley), Yutan.
Carter Lake, IA	Council Bluffs, IA., Arlington, Bennington, Blair, Elkhorn, Fort Calhoun, Fremont, Gretna, Kennard, Louisville, Murray, Omaha, Plattsmouth, Springfield, Valley, Waterloo, Yutan
Council Bluffs, IA	Bethesda, IA., Brunsville, IA., Carson, IA., Carter Lake, IA., Crescent, IA., Glenwood, IA., Grant, Linn Grove IA., Macedonia, IA., Massena, IA., Minden, IA., Mineola, IA., Missouri Valley, IA., Neola, IA., Oakland, IA., Omaha, Randolph, Rockwell City, IA., Silver City, IA., Sioux City IA., Treynor, IA., Underwood, IA.
Crescent, IA	Council Bluffs, IA., Mineola, IA., Omaha, Underwood, IA.

Exhibit A
Teitzel Affidavit
Attachment 2

OMAHA METRO

COX COMMUNICATIONS

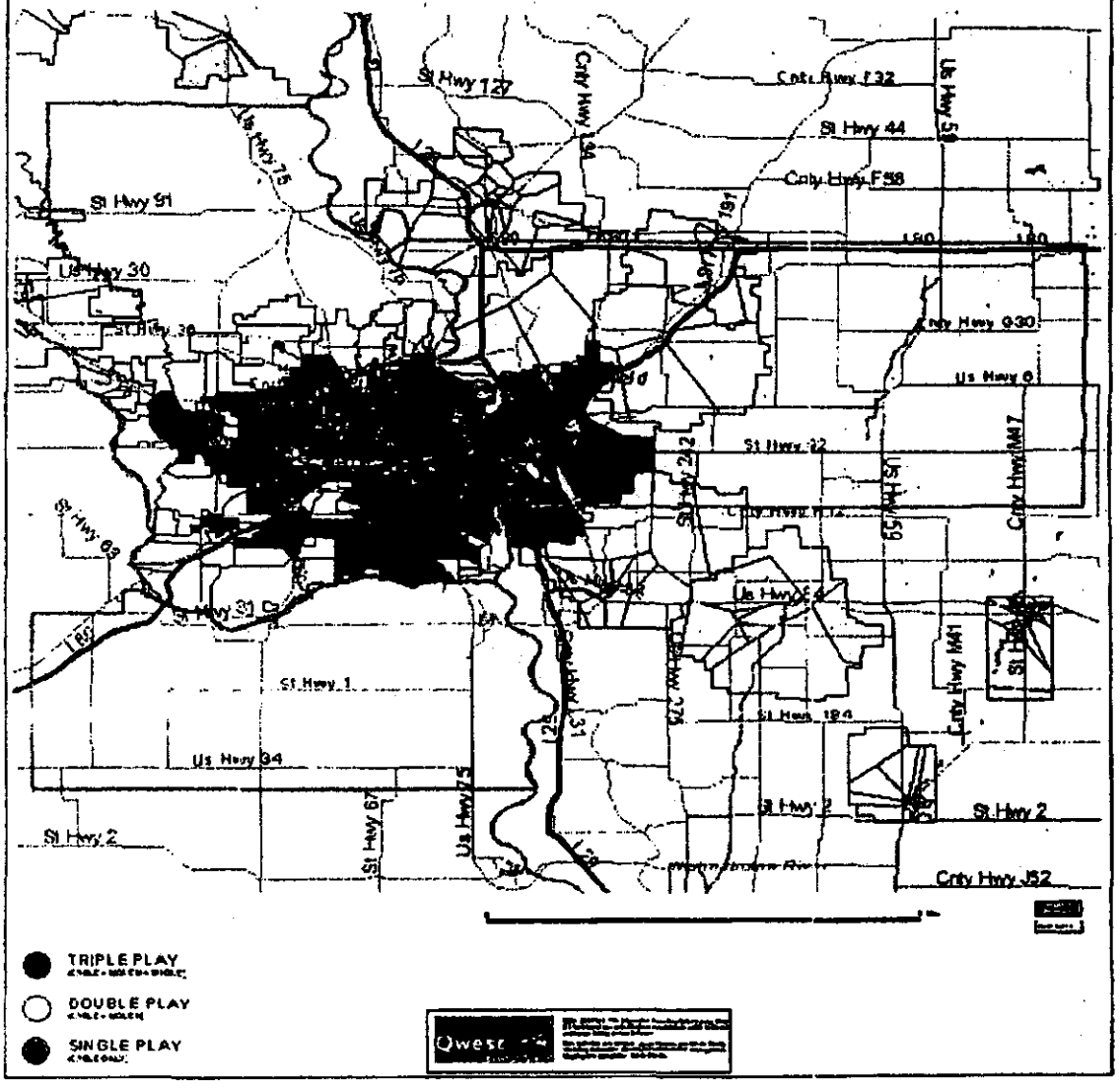
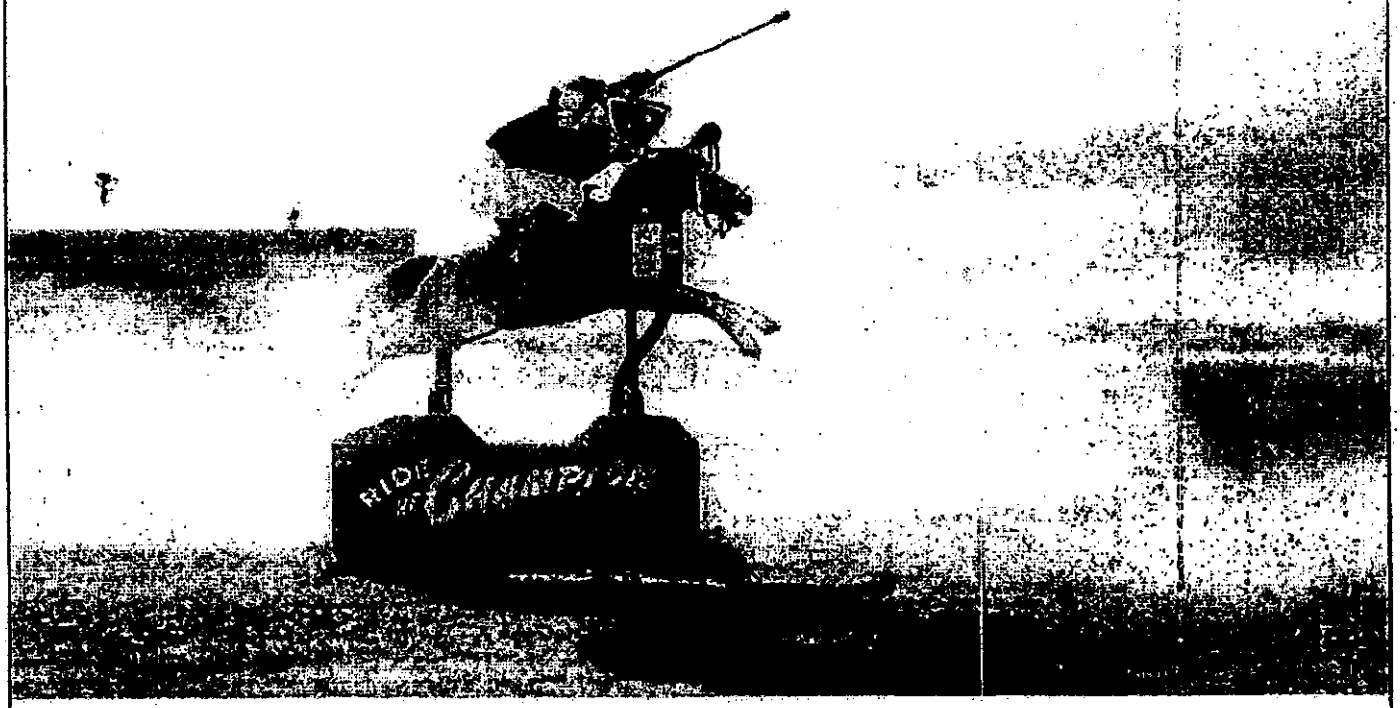


Exhibit A - Teitzel Affidavit - Attachment 3

TIRED OF DROPPING EXTRA MONEY INTO YOUR PHONE PROVIDER AND NOT GETTING ANYWHERE?



Outrun your competitors without having to outspend them when you partner with Cox Business Services, one of the most trusted providers in the industry. We offer flexible communications packages with leading-edge products like Cox Digital Telephone,* including all the features you expect, plus savings up to 20%.* And for data communications that blow past the competition, get Cox high-speed business Internet. With our nationwide next-generation IP network, and 24/7 local technical support, you'll have all the horsepower and people-power you need to help you race ahead and stay ahead of the competition.

CALL TODAY!

Find out how Cox Business Services can provide your business with a complete communications solution.

Call 1-888-848-1888 or visit www.coxbusiness.com

Voice Data Video

COX Business Services

Exhibit A - Teitzel Affidavit - Attachment 3

COX Business Services

GO WITH A COMPLETE COMMUNICATIONS SOLUTION FROM COX BUSINESS SERVICES AND RUN YOUR BUSINESS AT FULL STRIDE.

UP TO THREE MONTHS FREE.

Receive one month FREE for each new service — Cox Digital Telephone, Cox Business Internet and Cox Expanded Video. Plus FREE features and FREE installation.*

Contact us today to switch to Cox Business Services and get our special, money-saving offer.

Choose Cox Business Services and you'll partner with one of today's most trusted communications providers. Cox delivers a complete package of leading-edge data and commercial cable solutions to your business needs and size.

Cox Digital Telephone® makes switching easy and includes everything the "local" phone company offers — standard business lines, long distance and toll-free services, Centrex and more — plus quality service and savings up to 20%.*

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Exhibit A - Teitzel Affidavit - Attachment 4

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Omaha

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- Learn more
- Bundle and save
- Calling features
- Price calculate savings
- Special offers

BEST DEALS

EasyPay AUTOMATIC SECURE EFFORTLESS

Digital Telephone

Description		Cox Communications	Qwest
Monthly Service - Line			
1st line	☑	$15.89	$18.15
Add a 2nd line	☐	$7.89	$16.36
Add a 3rd line		$15.89	$16.35
Add a 4th line		$15.89	$16.35
Monthly Service - Features			
Convenient Features			
Call Forwarding	☐	$2.90	$3.00
Call Waiting	☐	$4.90	$5.50
Speed Calling	☐	$1.90	$2.00
Three-Way Calling	☐	$3.40	$3.50
Voice Mail	☐	$5.90	$6.95
Enhanced Features			
Call Return - *69	☐	$2.90	$3.95
Busy Line Redial - *66	☐	$2.75	$3.50
Selective Call Forwarding	☐	$2.50	$3.50
Priority Ringing	☐	$2.75	$3.50
900/976 Restriction	☐	FREE	$1.00
Premium Features			
Caller ID	☐	$6.50	$6.95

Exhibit A - Teitzel Affidavit - Attachment 4

Caller ID	☐	[illegible]	[illegible]
Inside Wire Repair Coverage	☐	$1.50	$4.75
Initial Service Activation Charges			
Service Activation Fee	☑	$29.95	$33.00
Non-working Jacks Activated or Installed - Quantity: 0		$0.00 at $25/jack	$0.00 at $50/jack
Monthly total:		$15.89	$18.15
One time installation fees:		$29.95	$33.00

With Cox Communications, you'll save:
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* The savings reflects Cox Preferred Rates (for customers who have at least one other Cox service). Pricing excludes tolls, taxes, and surcharges. Pricing for enhanced features does not include per use charges associated with some of those features, a more comprehensive desciption of pricing can be found in the pricing section of this site. Pricing and information valid only in the state of Nebraska. Rates subject to change. Services available only to residental telephone customers in Cox wired servicable locations, and all rates and saving comparisons exclude applicable taxes and surcharges and are subject to change. Individual savings may vary based on services, location, and usage. Other restrictions apply. © 2002 Cox Communications, Inc. All rights reserved. Qwest rates effective as of 1/20/2002.

EXHIBIT B

Exhibit B - Redacted-for Public Inspection

STRATEGIC POLICY RESEARCH

AFFIDAVIT OF JOHN HARING, JEFFREY H. ROHLFS AND HARRY M. SHOOSHAN III*

JUNE 17, 2004

1. INTRODUCTION

In this affidavit, we explain the economic basis for our conclusion that Qwest should no longer be regulated as a "dominant firm" in the Omaha market for telecommunications services regulated by the FCC. We begin by explaining why we think the Commission's decision in this case possesses considerable policy significance, not just for the particular competitive issues raised by Qwest's petition for regulatory forbearance in a single, specific (and, as it happens, highly competitive) local operating environment, but also, importantly, for the conceptual coherence and integrity of the Commission's overall regulatory enterprise. If the Commission's regulations lose their connection to economic welfare (not to mention, economic reality) and continue to apply in competitive markets (*i.e.*, where there is no genuine market failure to be corrected), they run a significant risk of becoming increasingly intellectually "untethered" and economically arbitrary and capricious.

After describing the types of economic considerations that are relevant for an assessment of market dominance, we briefly summarize actual competitive conditions prevailing in the Omaha market and explain how these conditions are virtually completely at odds with those that must be found to prevail for a valid finding of economic dominance. Omaha thus presents a clear and compelling case where current FCC regulation is highly ill-matched to actual operating conditions, and where, in consequence, regulation has become "part of the problem" rather than "part of the solution." In our view, there is thus in this case a highly credible economic and public policy basis for granting Qwest's petition and sought-for, deregulatory relief.

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1.1. IMPORTANCE OF TIMELY REGULATORY RECOGNITION OF ACTUALLY PREVAILING MARKET CONDITIONS

In economic terms, regulation is conceived (in part)[1] in terms of offering a remedy for so-called "market failures" of different types (*viz.*, monopoly, externalities and neighborhood effects, adverse consequences derived from high transaction or information costs including under-provision of public goods, *etc.*) Regulation is itself not without either costs or potential failure modes of its own, so its adoption or maintenance as a remedy implies at least an implicit judgment that the (net) benefits (in terms of correcting market failures) are worth the costs (both direct and indirect) and any attendant adverse consequences (effects of "regulatory failures" akin to "market failures").

On this economic view, regulation is (or should be) an intellectually coherent response to a problem in economic organization that results in a potential opportunity for expansion of economic welfare through (regulatory) correction of a particular type of market failure (say, the exercise of market power). And on this view, the performance of regulation is gauged in terms of its efficiency in actually realizing such potential benefits. To the extent that regulation does *not* perform effectively and realize economic benefits and/or is not economically coherently conceived to address genuine market failures, it lacks conceptual legitimacy.

Making sure there is a close correspondence and good matching of "regulatory" means and "correction-of-market-failure" ends is critically important for (at least) two reasons. First, if there is not, "the (regulatory) cure may be worse than the (market-failure) disease," with the consequence that society is economically worse off from imposition or maintenance of ill-conceived and/or poorly implemented regulations.[2] Second, if the ends do not warrant the means and there is little perceivable connection between alleged problems and alleged regulatory remedies, the regulatory enterprise itself will be subverted as it is perceived to be increasingly arbitrary and capricious, lacking intellectual coherence and purpose as a carefully considered response to a genuine problem of economic organization.[3]

We think that, were there a genuine problem of market dominance and an authentically economically dominant firm existed, there could well exist grounds for regulatory intervention to

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[1] This is the "normative" view, in contrast to the "positive" or descriptive view which, somewhat more cynically, views regulation as simply another kind of economic "good" for which there is both a demand and a supply, and whose provision may or may not conduce to greater aggregate economic welfare in particular cases.

[2] Regulation's "killing the railroads" is an oft cited example: continuation of strict monopoly controls, long after effective competition in ground transport for the railroads (from trucks) removed the rationale for such controls, all but destroyed the railroads in the U.S. Deregulatory reforms in ground transport have more recently revived the railroads as both complementary and competing freight carriers with truck transport.

[3] ICC rate regulation of the *competitive* trucking industry is a good example of regulation in search of a "market-failure" rationale. The result in that case was subversion of regulation to anti-competitive ends. One would be hard pressed to find economists *defending* the ICC's regulation of the trucking industry as "efficiency-enhancing."

address this problem.[4] Because regulatory intervention often reflects the operation of other forces besides fulfilling the objective of addressing such problems, including, for example, private rent-seeking through effective pursuit of government favor, we would still wish to reserve judgment about the wisdom of particular regulatory interventions *in practice*, but we would certainly concede the *potential* efficiency of regulatory intervention is such circumstances.

Where we have more of a problem is whether—particularly in the actual circumstances currently prevailing in Omaha—there is, in fact, a problem of market dominance there to be addressed by regulation and whether Qwest is, in fact, a "dominant firm" as that term is usually understood in economics. The problem with *inaction* in the face of real change—an error of "omission," if you will—is that it *weakens* competition. The notion that competition should somehow be restrained in order to promote it is intellectually incoherent, not to mention a contradiction in terms.

1.2. COMPETITIVE BENEFITS OF TIMELY DEREGULATION

The "godfather" of economic deregulation, Alfred Kahn, has referred to a conundrum which he characterizes as the economic equivalent of "Catch 22": regulators typically do not wish to deregulate *until* there is effective competition, but they cannot know if competition is effective *unless and until* they deregulate. Trying simultaneously to run two regimes—one regulatory and one competitive—is liable to produce the worst rather than the best of both worlds. That is because competition tends to undermine regulation, while regulation tends to undermine competition.

One way in which the competitive process operates is through the pursuit of market advantage via invention and innovation of new products and service offerings. Indeed, on one highly significant view (that of Joseph Schumpeter), this is the most important aspect of competition from the standpoint of improving the lot of consumers.[5] Clearly one effect of the network "sharing" regulations attached to assignment of dominant-firm status in telecommunications is to stifle the regulated firm's incentives to engage in this highly "consequential" form of competition.[6] Indeed, it is precisely these disincentive effects that have led to the telling

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[4] This presumes, for purposes of argument, that "real" economic dominance exists and that economically efficient regulation is the response adopted. In reality, dominance is a difficult premise to accept as even approximately realistic in today's telecommunications markets given the competition at hand. Moreover, that *current* regulation is itself economically efficient is a highly debatable proposition, which we would certainly question.

[5] Schumpeter's position was that such competition dwarfs the effects of competition "at the margins." *See Competition, Socialism and Democracy* (1950).

[6] *See* John Haring & Jeffrey Rohlfs, *The Disincentives for Broadband Deployment Afforded by the FCC's Unbundling Policies*, Prepared for the High Tech Coalition for submission before the FCC, *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services,* CC Docket No. 001-37, April 4, 2002; and Haring & Rohlfs, *The Disincentives for ILEC Broadband Investment Afforded by Unbundling Requirements*, Prepared for the High Tech Broadband Coalition for submission before the FCC, *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. *(footnote continued)*

criticisms leveled against the "essential-facilities" doctrine in the legal and economic professional literature. Some "sharing" may be desirable, but sharing is by no means a "free good"—it is widely recognized to carry with it adverse consequences in terms of disincentive effects on investment: Why should firms invest if the benefits they are permitted to reap are limited by regulatory sharing arrangements?[7] One would not expect persons to invest in houses if ownership does not convey control of access; why would one expect profit-seeking (and capital-seeking) firms to behave any differently?

"Investment" does not always take the form of purchases of plant and equipment. Design and provision of information about new service offerings (say, packages of services that offer the transactional convenience of a "one-stop" shop) are also costly activities that entail substantial investments. But firms whose ability to reap advantages from such investments is attenuated by tariff-filing and advance-notice requirements will find less advantage in sinking funds in these kinds of activities. This has the consequence of reducing the vigor of the competitive process and the quality of service available to consumers. It may make the competitive life a "quiet life" (what English Economic Nobelist John R. Hicks characterized as "the best of all monopoly profits"), but that surely is not what policies touted as "pro-competitive" should be producing.

Where warranted, timely deregulation will thus allow competition to function more effectively and, in this manner, permit realization of public policy objectives in terms of a more competitive marketplace and realization of deregulatory reforms. To the extent regulation necessarily *distorts* the effective operation of a more thoroughly competitive process, it had better be doing so to some productive end. But where the market-power premise that supplies the putative motivation for regulatory intervention has ceased to exist, the costs borne as a consequence of allowing these distortions carry no off-setting benefits, at least for the consuming public.

Of course, in contrast to consumers, other *producer* interests may well stand to benefit from maintenance of unwarranted and counterproductive regulations. Indeed, the prospect of such benefits often supplies a powerful incentive for investments, *not* in better products and services, but in acquisition of governmental favor in the form of cartelizing regulatory management of competition and other forms of economically non-productive "rent seeking." In this instance, competition for government favor substitutes for marketplace competition on the merits. The way to prevent that from happening, or at least to minimize the harms associated therewith, is timely recognition of marketplace *realities*: when the anti-competitive harms of regulation likely exceed any pro-competitive benefits of regulation—because market dominance no longer exists and the reason for dominant-firm regulation has thus disappeared—the time to change policies is at hand.

001-37, July 16, 2002.

[7] Note that the fact that regulators may wish to "capture" such profits for redistribution to consumers via *other competitors* does not reduce the disincentive effect.

We think that time has long come in Omaha, where it is difficult to see how any disinterested analyst could conclude that Qwest is the economically dominant operator. Before examining the circumstances currently prevailing in that locale, we provide a brief discussion of the economic meaning and appropriate application of the "dominant-firm" model of industrial organization economics. This will supply the relevant analytical context for discussion of Omaha specifics.

2. ECONOMIC MEANING OF MARKET DOMINANCE

2.1. UNILATERAL OR INDIVIDUAL MARKET POWER

In economic terms, the idea of "the dominant firm" has a specific and fairly straightforward meaning:[8] a dominant firm is one which faces such *weak* competition from actual and potential rival suppliers that it simply lets them "do their worst" and then searches for prices that maximize profits taking the "residual" demands (*i.e.*, the demands that are "left over" after rivals have taken *all they can*) as a given. As with the economic models of "perfect competition" or "perfect monopoly," the "dominant-firm" model produces "deterministic" results; less than perfect competition or monopoly, in contrast, produces analytical indeterminacies that require additional information about the specific manner in which firms are assumed to interact with one another in order to predict market outcomes.

Whether the "dominant-firm" model represents a good economic description of a particular marketplace depends on the realism and, hence, reasonability of assuming that the firm being analyzed (*viz.*, usually the so-called "incumbent" operator, although this is not entirely apposite when the local cable operator is one of the "other" competitors) can simply "afford" to let rivals do their worst and proceed blithely on its (and they on their largely inconsequential) way. That can presumably *only* be an accurate characterization of actual circumstances where the competitive damage rivals can inflict upon the incumbent is economically *minimal*. Where rivals can be credibly conjectured to do *a lot* of competitive damage, especially were the incumbent to (attempt to) exercise market power it does not possess or possesses only minimally, proceeding on the premise of an economically "dominant firm" represents an error and is, therefore, likely to produce flawed conclusions about appropriate regulatory policies.

The *actual or prospective productive capabilities* of competing suppliers determine the realism of assuming they pose a negligible threat to the incumbent's market hegemony: if competitive resource deployments and conditions of market entry are such that actual or potential competition of substantial magnitude is economically credible, it will be unrealistic and difficult to entertain such an assumption. It will be unrealistic for two reasons: (1) the actual and

[8] *See* John Haring and Kathleen Levitz, "What Makes the Dominant Firm Dominant?" Federal Communications Commission, Office of Plans and Policy Working Paper Series, Number 25, April 1989.

prospective market shares of rival firms will constrain and, indeed, plausibly render *counterproductive* any attempt by the incumbent operator to exercise market power by increasing the elasticity of market *supply*;[9] (2) the ability and willingness of consumers to switch to closely competitive substitute means to satisfy their preferences and requirements will similarly limit or preclude market power by increasing the elasticity of market *demand*.[10]

In the latter regard, it is worth pointing to the existence of so-called intermodal competition and its role in limiting market power and precluding market "dominance" in related sectors: thus, regardless of whether one regards wireless service as a sufficiently close substitute for wireline service to constitute the *same* economic good (*i.e.*, as trading in the *same* market),[11] the existence of good wireless service increases the elasticity of demand for wireline service and, consequently, the scope for any exercise of market power. One can (incorrectly in our own view) "exclude" wireless service from the relevant economic market, but so doing by no means renders wireless service irrelevant in assessing market power in a more narrowly construed "market" for wireline service. When wireless is "excluded," its effect still shows up in the measured elasticity of (narrowly-defined market) demand, which will/must be greater to the extent excluded services are at least somewhat substitutable for included ones (as is surely the case of wireless services with respect to wireline service).[12]

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[9] In economic terms, market power is defined as the ability to raise market prices and restrict market outputs *profitably*. The extant or impending capacity of rivals to take share limits the potential for profitable limitation of market supply. Rivals need not possess the ability to take *all* the business of their dominant rival; just enough to make monopolistic price increases unprofitable.

[10] No less an authority than Economic Nobelist Paul Samuelson has noted that:

> [T]he demand curve of any firm is equal to the demand curve of the industry minus the supply curve of the remaining firms, *already in the industry or potentially therein*. This being the case, it is easy to show that under uniform constant costs the demand curve for a firm is horizontal even though it produces 99.9 percent of all that is sold...Economically, if the firm were to begin to restrict output so as to gain monopoly profit, it would cease to sell 99.9 percent of the output or even anything at all. Consequently, it would not attempt to do so, but would find its maximum advantage in *behaving like a pure competitor*. (emphasis added)

See Foundations of Economic Analysis (1947) at 79.

[11] To be properly regarded as trading in the same relevant economic market, different goods and services need not be perfect substitutes for one another—there must simply be economically significant cross-elasticity of demand. All perfect substitutes trade in the same relevant markets, but *even* imperfect substitutes limit market power and dominance by increasing the elasticity of market demand and, hence, the scope for exercise of market power. Excluding a supply source from the relevant market on grounds of insufficiently high cross elasticity of demand does not imply that the availability of the excluded source does not operate to increase the elasticity of demand for supplies *within* the (narrowly-drawn) market—in fact, it does just that.

[12] This point is made explicitly by Judge Richard Posner & Professor William Landes in their famous *Harvard Law Review* article on "Market Power in Antitrust Cases" (94:5, March 1981). As they note (at 962):

> If the market were defined narrowly, the firm's market share would be larger [than if the market were

(footnote continued)

So the *economic* issue in assessing market dominance is whether the firm being analyzed possesses *unilateral* (*i.e.*, individual) market power to restrict market outputs and raise market prices profitably. Characterization of a particular firm as economically "dominant" rests on the premise that the competition can capture only *minimal* share and, thus, that the dominant firm can safely let the competition "do its worst" and proceed virtually unharmed. The ability to take share turns on actual or potential productive supply capacity; if rivals possess substantial actual capacity and/or transparent ability readily to expand output from capacity already in place or to deploy additional productive capacity, the incumbent firm cannot "afford" to ignore the, in this case, assumedly *significant consequences* of any attempt to exercise market power and, therefore, cannot be accurately characterized as economically dominant.

2.2. EQUIVALENCE OF ECONOMIC AND LEGAL DEFINITIONS OF DOMINANCE

There is a clear and close correspondence between the economic meaning of market dominance and the applicability of the dominant-firm model to describe economic conditions in a particular relevant economic market, on the one hand, and the legal and regulatory administrative interpretations of the concept contained in the 1996 Telecommunications Act and those previously adopted by the Commission in related proceedings, on the other.[13] The latter have explicit reference to economic problems related to exercise of market power (*viz.*, "just and reasonable" rates, "protection" of consumers, pursuit of "public interest" objectives, *etc.*). Regulatory forbearance is specifically posited to turn on credible showings that regulation is not necessary to ensure just and reasonable conduct, to protect consumers or to promote the public interest.

The inapt characterization of a firm as economically dominant and the inapplicability of the dominant-firm model strongly suggest that regulatory arrangements premised on the reverse set of conditions will prove harmful.[14] Not only is dominant-firm regulation of a *non-dominant* firm *unnecessary* to ensure achievement of stated policy objectives, but it is also likely to *subvert* achievement of relevant objectives in terms of justice, reasonability, consumer protection and various public interests as have been specifically enumerated.[15] What may be appropriate *given*

> defined more broadly] but the effect on market power would be *offset* by the higher market elasticity of demand; when fewer substitutes are included in the market, *substitution of products outside the market is easier.* (emphasis added)

[13] *See Qwest Petition.*

[14] For example, Haring & Levitz (*op. cit.* at 8) state that "when no firm can be uniquely categorized as dominant, no asymmetric assignment of regulatory liabilities can be legitimately defended. A new market environment calls for new rules."

[15] *See supra* at 2 - 3.

a genuinely dominant firm may well prove highly inappropriate in its absence. Indeed, the regulatory tools utilized to restrain the exercise of market power in one set of circumstances may well *promote* it in a different set of circumstances.[16] It is not a simple matter of redundancy, but rather of *counter*-productivity. And as we earlier argued, there are *also* important issues of *institutional integrity* implicated by a decision (or *in*decision) to maintain outmoded and intellectually incoherent "dominant-firm" regulations in the face of compelling contrary evidence.

3. QWEST'S NON-DOMINANCE AND ANOMALOUS REGULATED STATUS IN OMAHA

3.1. MARKET CONDITIONS DO NOT FAVOR EFFECTIVE OUTPUT RESTRICTION

Market power is the *sine qua non* for market dominance in the policy relevant sense.[17] Market power is, in turn, the ability to restrict *market* output and profitably raise *market* prices above the levels that would prevail in an environment where outputs could not be uneconomically restrained. The analytically relevant focus for diagnostic inquiry is thus on the basic conditions of supply and demand affecting the ability of a single seller to restrict output. Where, as in Omaha, prevailing conditions do not conduce to effective output restriction, the fundamental necessary requirement for economic dominance—unilateral market power—does not obtain.

The ability of one market participant to restrict market output obviously depends in a critical way on the ability of other market participants to expand output and thus to offset any output restriction. The ability to effect an offsetting expansion of output, in turn, depends on the ability of competing firms to enter a market and/or, having entered, to increase output either utilizing existing unused capacity or deploying additional productive capacity. The dual capacities to enter and increase relevant outputs thus turn on market "entry" conditions and whether there are any "binding" constraints on the availability of necessary resource inputs (including whether there is, in the short run, "excess" capacity available readily to increase the supply of desired outputs).

[16] Haring & Levitz (*op. cit.* at 17 and 18) observe that "effective recognition of mutual interdependence will be easier to the extent that tariffing and other regulations make it easier for competitors to signal their own intentions or to fathom the intentions of their rivals," and that "the public might well be harmed if new regulation actually facilitated collusion."

[17] A firm that "dominates" its market in consequence of the excellence of its performance in competition with its rival competitors does not present a market-failure problem for public policy to address.

With respect to the existence of barriers to output expansion in the instant setting, we would note, first, that there are no legal barriers preventing expansion of output by competitors; indeed, a principal thrust of post-1996 Telecom Act policy has been systematic removal of virtually all such barriers and implementation of a variety of policies designed to facilitate easy entry. It is important to remark in this regard that the State of Nebraska *has long been in the forefront* of pro-competitive *de*regulatory reform; open markets and (comparatively) free competition have been the rule there *since 1986.* Not surprisingly, competition (and, primarily, "facilities-based" competition at that) has thrived there and the State's innovative policies are widely viewed as a virtually unqualified success. The consequence in Omaha has been competitive entry in a wide variety of shapes and forms, including *facilities-based* entry utilizing both conventional (wireline) and unconventional (wireless, VoIP) technologies and riding on standalone (wireless, wireline) and shared technology platforms (cable), as well as *resale-based* entry utilizing both discounted retail services and bundled network elements (UNE-P).

The equipment required to provision and implement an expansion of output is, for the most part, produced under conditions of constant or increasing returns to scale. The relevant technological "know-how," while itself specialized, is not so limited in supply (and "superior" as, say, Saudi oil reserves) as to inhibit economic expansion of output.[18] Given the depressed state of the communications equipment supply industry, equipment suppliers would presumably be only "too happy" to facilitate further expansion of communications service outputs through sales of new capital equipment and consumer gear.

Economies of scale are sometimes cited as potential barriers to expansion of output and competition in telecommunications markets. Two general points are worth noting in this regard. First, not all technologies capable of meeting consumer demands are characterized by the *same degree* of scale economies and some also possess potentially offsetting economies of *scope* that may facilitate competitive entry. Thus, it is clearly feasible to exploit technologies that are capable of providing a *variety* of services (*e.g.,* multi-channel video program delivery or electrical power distribution in addition to telephony services—whether POTS or high-speed Internet access)[19] so that more applications can "ride" on any necessary dedicated or share facilities including rights of way. Alternatively, technologies that involve less, perhaps only minimal, utilization of "dedicated facilities" (such as fixed access lines "dedicated" to particular users)—wireless is an example—may also be economically exploited.

In these regards, consider that, in the case of cable, while individual consumer "subscriber lines" are required (*i.e.*, a "dedicated" subscriber "access" network is necessary),[20] to deliver service,

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[18] George J. Stigler cites the existence of "superior resources" as "occasionally" and usually only "temporarily" creating and permitting the exercise of some market power. *See The Theory of Price* (New York, Macmillan, 1966).

[19] Of course, there is also clearly considerable scope for economies in joint provision of various telecommunications services themselves, say, high-speed broadband access services and VoIP telephone calling, for example.

[20] There is, of course, a lot of resource "sharing" involved in the provision of cable's various supply offerings *among different consumers* as well (*cf.* video programming inputs).

much of this capital infrastructure can be utilized to deliver *several* different services (including, in the first instance, multi-channel video programming and, in addition, high-speed Internet access, POTS, VoIP and various home management services), so costs can be effectively spread over many different kinds of outputs (*i.e.*, there are considerable economies of scope). Thus, the cable industry can, and, indeed, has (as we shall presently remark in Omaha) manifestly overcome this potential "barrier" to delivery of phone service, and there is nothing preventing a further expansion of service to whatever degree is demanded in the (local) marketplace. Indeed, there is a forceful economic (*viz.*, profit) dynamic pushing such expansion.

With wireless services, the story is a little different; entry via this means is economically feasible and plainly not precluded or blockaded by economies of scale (and, again, has already occurred, seemingly rendering the issue of entry feasibility somewhat academic)—in this case because the degree of feasible network resource sharing is greater than with wireline service (*i.e.*, a smaller percentage of the relevant assets are "dedicated" to individual users/a larger percentage of productive assets are "shared").

The second point that it is important to note, in terms of the comparative economic *in*significance of scale economies and opportunities for competition, is that *voluntary contractual* sharing of network facilities is an entirely feasible alternative, implying ample opportunities to share in economies from resource-sharing. Indeed, there are, as we shall presently describe, powerful economic and strategic incentives pushing toward effective exploitation of opportunities for realizing cost economies through network-resource sharing. The great debates about the economically appropriate extent of network element unbundling and whether a second "resale window" is appropriate are primarily debates about appropriate contractual terms and conditions and appropriate means for determining them. These debates and the commentary associated with commercial bargaining negotiations (especially that disclosed/advertised in public) should not be allowed to obscure the fundamental economic realities working in favor of "deals" being struck—in particular, the economic cost savings that potentially inhere is network sharing arrangements.[21]

To what extent should transactions occur at mutually advantageous terms defined by the preferences of buyers and sellers, as with most marketplace exchanges, and/or to what extent should they be conditioned by governmental constraints and compulsion? In the absence of the latter, terms and conditions may well vary (from those currently prevailing—but under legal duress), but that, by no stretch, *precludes* deals being cut; indeed, the absence of constraints and compulsion may well permit realization of very attractive transactions for capabilities that would

[21] The incentives of both buyers and sellers are complex: of course, buyers would like to pay less, but they would also like to buy more; and while sellers would like to charge more, they would also like to sell more. In both cases, there are thus *internal* as well as external conflicts to be reconciled.

otherwise not be economic to undertake or only undertaken on much less favorable and attractive terms.[22]

3.2. STATUS OF COMPETITION IN OMAHA

As we have seen, "what makes the dominant firm dominant" is the conjectured *inability* of competing firms to make economically significant competitive inroads against the dominant firm. A real dominant firm faces such *weak* competition that it can simply allow the competition to do what(ever) it will, since *by assumption* (if the "dominant-firm" model is an accurate depiction) this amounts to very little, and then proceed to optimize its economic decisions with respect to the demand that remains—*i.e.*, the "lion's share" of demand *given* the premise of *weak competition.* A firm is thus dominant less because it is strong than that the competition it faces is weak—alternatively, it is strong/dominant *because* the competition is weak.

Turning to the specifics of competitive conditions actually prevailing in Omaha, one is immediately struck by the transparent *inapplicability* of this analytical model as a means to describe Qwest's ostensible competitive status and *modus operandi* in this market. Far from confronting weak competition that can, even potentially, inflict only minimal competitive harm, Qwest confronts competitors that have *already* taken a substantial/indeed, a "lion's" share of the business, and are evidently—given the productive capacity they have *already* deployed—fully capable of taking even more and, moreover, possessing compelling economic incentives (given the productive capacity that has already been sunk) to do so. For Qwest, it is thus hardly a matter of allowing "scavenging" rivals to share a little of the competitive "catch," given their ability to take *only* a little; it is instead a matter of Qwest *itself* needing to (be *free* to) strive vigorously to retain sufficient business to remain competitively viable.

In his affidavit,[23] David L. Teitzel has developed market share estimates for residential and business local exchange service in the Omaha MSA. It is worth noting that, while Teitzel's estimates are *inconsistent* with economic dominance by Qwest, they are, nevertheless, analytically quite *conservative* measures, *i.e.*, if anything, they are likely to *overstate* Qwest's degree of economic "dominance," since they "exclude" economically significant intermodal demand substitutes (*viz.*, notably wireless and rapidly growing VoIP services).[24] As we observed above, the competitive effect of excluding demand substitutes from the economically "relevant market" (on grounds of insufficiently "close" substitutability to warrant inclusion in the "same" market) must necessarily manifest itself in a *higher* market demand elasticity implying *less* potential scope and incentive for any exercise of market power. In order for excluded services to

[22] Recall the proverbial tale of the heavily discounted can of tuna fish, whose only disability is that there is none to be found on the grocer's shelf.

[23] *See Affidavit of David L. Teitzel, Local Telecommunications Competitive Environment: Omaha/Council Bluffs,* dtd.

[24] Because they are conservatively based and fail to reflect certain relevant forms of competition, Teitzel's market share estimates *understate* Qwest's *non*-dominance.

have *no* impact on the (relevant) market demand elasticity (and the degree of market power), one would have to assume, rather drastically and surely unrealistically, that there would be *no* substitution toward excluded services were relative prices to change and given other service characteristics besides relative prices affecting the "value-for-money" proposition confronting consumers in particular circumstances.[25]

Teitzel estimates that CLECs now account *for more than* [redacted] *percent* of the Omaha market denominated in access lines.[26] By far the bulk of these lines reflect "facilities-based" competitive alternatives with only about [redacted] of some [redacted] thousand total lines supplied through offerings derived from the two "resale windows" (UNE-P and resold retail lines).[27] Moreover, the bulk of the competition's gains have come out of Qwest's "hide" rather than market growth—Qwest's access baseline has declined by *more than* [redacted] *percent* since year end 2,000 through February of this year. Qwest has lost more than [redacted] residence lines and more than [redacted] business lines over this period. The customers Qwest has *lost* are amongst its *most valuable* ones, accounting for the highest consumption values and a disproportionate share of the calling.

An ostensibly "dominant" firm that loses [redacted] of its business over a three-year period and finds itself with a *declining* market share of *less than* [redacted] percent can, by only the most difficult and implausible of intellectual stretches, be categorized as economically "dominant"—"desperate" or "driven" strike as perhaps more apposite adjectives in these circumstances. This is particularly so given the specific identities of the competitors Qwest confronts in the Omaha market, the productive facilities these competitors have *already* deployed and the economic imperatives plainly dictated by these various resource deployments.

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[25] One may wish to define markets narrowly for any number of reasons (some good/some bad), but "squeezing the balloon" in this fashion does not *moot* the competitive impact of the excluded substitute's existence; it merely leads to its competitive manifestation on the demand side rather than in a lower measured market share on the supply side (*i.e.*, in terms of the market's necessarily *greater* demand elasticity and resultant lesser susceptibility to monopolistic exploitation). Growth in demand for wireless and VoIP services in significant part represents substitution for less *economical* wireline calling. In the case of wireline-versus-wireless calls, this stems from the frequent effect of convenience/inconvenience which often makes a wireless call more economic notwithstanding a (sometimes) higher price. Heretofore, VoIP has primarily afforded international callers with an economic alternative to often highly inflated charges for such calls, notwithstanding lower technical call quality. With rapid technical advance, the latter disabilities of VoIP are rapidly becoming a thing of the past.

[26] CLECs are estimated to supply [redacted] percent of the total number of lines ([redacted] percent of residence lines and [redacted] percent of business lines). Consumers who avail themselves of competitive alternatives are typically heavier callers, implying that CLECs now account for an even higher proportion of calling in Omaha.

[27] We believe it is worth stressing the extent of *facilities-based competition* in the Omaha market: UNE-P accounts for only a very small part of the total competitive picture there, and its subsequent disposition is a matter of comparatively little import for assessment of competitive conditions there. Nevertheless, as we presently note, there is every reason to expect continued competitive activity utilizing this type of input provisioning based on mutually advantageous gains from trade.

It is worth noting, by way of comparison, that Qwest has lost *greater* share in the Omaha market than AT&T had in the national market for long-distance service at the time the FCC declared it non-dominant.[28] Indeed, Qwest's Omaha operation has not only lost share *in relative terms*, but has also suffered losses of business *in absolute terms*. AT&T, in contrast, while suffering significant share losses in long-distance was still able to grow its business in absolute terms, given increases in the size of the long-distance market (*i.e.*, market growth) during the applicable period. In both cases, significant share losses were manifest as was the deployment of significant competitive productive capacity.

In Omaha Qwest is not exactly being "eaten by ants" (not that it is impossible to be "eaten by ants" in an economic manner of speaking; *cf.* United and American Airlines and their losses to small discount airlines generally offering "point-to-point" service rather than running "hub-and-spoke" networks).[29] Qwest's most significant competitor in the Omaha MSA is Cox, one of the nation's leading cable MSOs. In addition, facilities-based local exchange service offerings are being made by McLeod, Alltel and Huntel, each a significant enterprise with telecommunications operations and experience in a multitude of competitive venues.

Teitzel utilizes changes over time in the number of Local Interconnection Service (LIS) trunks in service within the market to gauge the growth of competition and to estimate the growth of the access lines served by facilities-based CLECs.[30] He finds that the number of such trunks used by facilities-based CLECs in Omaha *has approximately doubled* since December 2000 as CLECs have resized their networks to accommodate a rapidly growing customer base. Again, this is an observation that is virtually impossible to reconcile with market "dominance" by Qwest.

Teitzel also examines information contained in the Local Exchange Routing Guide (LERG) that describes, *inter alia*, the local switches deployed by carriers within a state, the area codes and prefixes assigned to each switch, the rate centers served, the types of switches deployed, their physical location and other types of information of use in ensuring efficient processing of calls in a "network of networks." He finds eight CLECs with prefixes assigned to switches serving rate centers in the Omaha-Council Bluffs MSA. Not all carriers list the specific identity of the switches they have deployed, sometimes simply noting, for example, that a "digital switching system" has been installed. Several switches are specifically identified, and Teitzel remarks that

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[28] *See* John Haring, Jeffrey H. Rohlfs and Harry M. Shooshan III. *Disabilities of Continued Asymmetric Regulation of AT&T.* Prepared on behalf of AT&T for submission before the FCC, *In the Matter of Motion for Reclassification of AT&T as a Nondominant Interexchange Carrier,* CC Docket No. 79-252 (June 30, 1995).

[29] Indeed, "death by a thousand cuts" may be a less preferred way of going. The "dominant-firm" model can potentially be utilized to analyze cases where the so-called "competitive fringe" is large, as long as no single firm is so large that the dominant firm must take its potential competitive responses into account. That is decidedly *not* the case with regards to Qwest's position in Omaha in relation to Cox and the several facilities-based CLECs in confronts in contesting for the custom of *both* residence *and* business customers.

[30] As Teitzel notes (at 5), as the number of end-user lines served increases, the number of LIS trunks in service must also increase to minimize call blockage.

three of the Omaha CLEC switches *alone* possess sufficient capacity to accommodate some *400 thousand* end-user lines—more than *double* the number of CLEC lines estimated to be "in service" currently and more than [redacted] percent of the *total* number of lines currently in service.

These data indicate that there is ample "excess" switching capacity *currently deployed*, and that competitors are well-positioned to expand the number of access lines they serve.[31] These data are completely inconsistent with "weak" competitors incapable of inflicting significant competitive losses on Qwest. To the contrary, competitors are in a position to take virtually *the whole market* (more than [redacted] of which they have already taken)—hardly a condition conducive to sound sleeping let alone allowing rivals to take their fill *for what does it matter!*

Switches are obviously not the only form of capital from which expansion not only *can* emanate, but is also presumptively *compelled* by competition and profit-seeking behavior. For example, we earlier noted the existence of significant potential economies of *scope* derivable through more intensive utilization of existing plant and equipment. A cable-system operator can use "subscriber lines" not only to deliver video programming, but also to supply telephone services, high-speed Internet service and so on. Indeed, a prime current competitive marketplace "modality" is to offer a "one-stop shop"—a transactionally convenient bundle of services.

Indeed, to the extent this type of *extensively* bundled type of offering is what consumers, by and large, desire, the cable operator in any given locality would appear to possess some significant competitive advantages, certainly relative to the traditional telephone company. It can, for example, use its network to supply a ubiquitous high-speed Internet access service (in contrast to telco-provisioned DSL which suffers geographical impairment) and to offer a very large menu of different types of video offerings. It thus has more ways "to skin the cat," in particular, more potential revenue streams to tap more economically in recovering the costs of its network investment.[32] Consumer "tastes & preferences" are what define economically relevant "product" markets. If consumers largely seek an extensive bundle of services—and view such a bundle as "superior" to a disaggregated set of offerings—the vendor who can most efficiently assemble such a bundle has an economic advantage. Whether such an advantage translates to "dominance" is an open question; what does seem abundantly clear is that a "plain, old telephone company" can hardly be considered the dominant player in this new kind of game.[33]

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[31] This is not to imply that such expansion may not require plant upgrades of various sorts to facilitate growth. For example, to offer cable modem service throughout its entire local network, Cox may need to upgrade its fiber facilities. Teitzel remarks that Cox is currently advertising its *full* service package *extensively* throughout the core market in Omaha.

[32] Not only does the cable operator possess a larger bundle of potential offerings, but if there are economies of internal organization (versus integration via, say, contract), the cable operator will be able to exploit these multiple revenue streams at lower effective costs.

[33] Where continued regulation is deemed appropriate (say, with respect to charges for terminating access), there is no economic basis for treating Qwest's access charges any differently *in regulatory terms* than Cox's or the other CLECs' rates. It is the "character" of termination not the specific identity of any particular carrier that conceivably *(footnote continued)*

3.3. VERY HIGH IMPLIED ELASTICITY OF DEMAND FOR QWEST SERVICE

The elasticity measure relevant for assessment of a firm's market power is the price elasticity of demand *it* (*viz.*, the firm) confronts—as opposed to the market elasticity of demand. While a high market demand elasticity precludes a low firm elasticity, a *low* market demand elasticity by no means precludes a *high* firm elasticity. Indeed, individual firm elasticities of demand, in general, are much greater than market demand elasticities.[34] That is because while consumers may lack close or perfect substitutes *outside* any given relevant market, making the *market* demand less than perfectly elastic,[35] they usually have, at least, some alternatives (other than the case of "pure monopoly") within any given market and there is, generally, some non-negligible prospect of entry or expansion of output from productive capacity already deployed, further increasing demand elasticities perceived by individual firms.

Market demand elasticities for telecommunications services are often estimated to be relatively price inelastic or unitary elastic.[36] Individual firm elasticities are much higher because these reflect consumers' ability to switch to competitors' offerings in the event of a price increase by one supplier. In the Omaha market, the service demand elasticities perceived by Qwest are quite *high—i.e.*, demand is very *elastic*, indeed. Consider that with several firms offering virtually indistinguishable service offerings to Qwest's telecommunications offerings at comparable, competitive prices, any attempt by Qwest to raise the prices of its offerings would prompt wholesale substitution of its competitors' offerings by consumers.

Indeed, within a comparatively short period of time, the mere *introduction* of competitive offerings into the Omaha market at modestly discounted prices and as part of discounted "bundled" service offerings (in one notable instance, *extensively* bundled to include MVPD service from cable) has produced very substantial business losses for Qwest. The observed *fact* that Qwest's market share has *more than halved* within three years in response to *far less* than an effective halving of prices is consistent with a *very elastic* demand for Qwest's service.[37]

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triggers a regulatory requirement in this type of case.

[34] Even in the case of a pure monopoly, where the elasticity of demand for the firm's outputs and market output are seemingly the same, the potential for entry in response to a price change likely renders the perceived firm elasticity greater than that of the market.

[35] As earlier noted, less-than-perfect substitutes—which *are*, nevertheless, *partial* substitutes—*do* increase market demand elasticities, but their "imperfection" is precisely what "defines" an economically relevant market. Economically relevant markets are often defined as "chinks in the chain" of substitutes.

[36] With a unitary elastic demand, a small percentage price change prompts an equivalent percentage change in quantities demanded.

[37] Price elasticities are, of course, formally defined in economic terms in "instantaneous" terms, *i.e.*, for percentage price changes posited to be arbitrarily/infinitely small, with other relevant factors held constant. The facts actually observed in Omaha over the last few years imply that, could one measure the relevant elasticity directly, it would be *(footnote continued)*

Highly elastic demands, in turn, preclude any opportunities for *profitable* restriction of output. Not only is Qwest plainly not in a position to restrict *market* output, given the supply capabilities of its actual and potential rivals, their ready availability as a demand substitute for Qwest's offerings—an alternative consumers have plainly shown themselves fully willing to exploit—implies that Qwest has no ability to raise market prices in a non-competitive manner.

4. CONCLUSIONS

Strictly speaking, economic dominance entails the ability not only to restrict market output and raise market price, but also, and importantly, by *inconsequential effects* of so doing on the competitive behavior and effectiveness of actual and potential rival firms. If the exercise of alleged "dominance" is merely to afford profitable and promptly realizable expansion opportunities by rival firms, there is no economically meaningful sense in which dominance can be posited to exist. Dominance requires an absence of competitive productive capacity and binding constraints on expansion of such capacity. Neither of these conditions can accurately be said to characterize the Omaha market. Quite to the contrary, competitors there have *already* made very substantial competitive inroads and appear to possess ample capacity and a great likelihood of making further ground on the incumbent telephone company; indeed, any attempt by Qwest to exercise "dominance" would be entirely self-defeating and economically irrational in the prevailing circumstances.

It is incontrovertibly the case that operating realities in Omaha strongly support Qwest's lack of market dominance and it petition for relief from FCC regulation as a "dominant firm" in this market. Not only is deregulatory relief strongly warranted in this case, but there is a substantial basis for thinking that the sought-for relief will promote *more vigorous competition.* By the same token, it would be a failure to grant relief that would inhibit competition and, thus, be fundamentally at odds with achievement of public-policy objectives in terms of promotion of competition, consumer welfare and the public interest. Maintenance of unnecessary and ill-adapted regulations would conflict with achievement of sought-for objectives, and would also produce a highly undesirable side effect: it would subvert the basic legitimacy and integrity of the regulatory undertaking and undermine support for the regulatory enterprise where its operation may well be justified.

In our view, granting Qwest's petition would allow the FCC to "do the right thing" and compellingly demonstrate both its commitment to real competition and its ability to function as an "honest broker."

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much greater than unitary elastic, *i.e.*, very elastic.

Exhibit B - Redacted-for Public Inspection

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that I have caused the foregoing **PETITION (redacted) OF QWEST CORPORATION FOR FORBEARANCE PURSUANT TO 47 U.S.C. § 160(c)** to be 1) filed with the Office of the Secretary of the FCC and 2) served, via hand delivery, on the FCC's duplicating contractor, Best Copy and Printing, Inc., at the following addresses:

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Office of the Secretary
Federal Communications Commission
Room TW-A325
445 12th Street, S.W.
Washington, DC 20554

Best Copy and Printing, Inc.
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Room CY-B402
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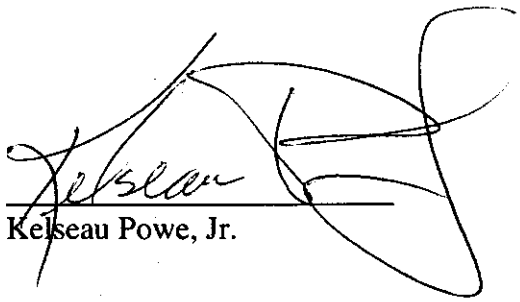

Kelseau Powe, Jr.

June 21, 2004